

# Update

Working Together for Families and Children

JUDICIAL COUNCIL OF CALIFORNIA • ADMINISTRATIVE OFFICE OF THE COURTS • DECEMBER 2001 • VOLUME 2, NUMBER 3



Judge J. Richard Couzens (right) with the court clerk, the bailiff, and three jurors.

## "Youth Courts" Focus of Statewide Training Conference

On October 25–26, more than 100 representatives of courts, schools, and law enforcement agencies gathered at the Administrative Office of the Courts for the statewide California Youth Court Training Conference, about a new and creative response to juvenile crime.

Growing in popularity in California, youth courts are designed to be an effective alternative to the traditional justice system in juvenile cases. More than 32 counties now operate 45 youth court programs throughout the state and are reporting success.

Generally, juveniles in cases handled by youth courts admit guilt, and the courts—also called teen and peer courts—decide the sentence or punishment.

The conference began with remarks by Chief Justice Ronald M. George and

Judge J. Richard Couzens, who directs the Placer County Peer Court.

In a live demonstration of a youth court jury trial, two young defendants

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## JUDGE TERRY FRIEDMAN NAMED JUVENILE COURT JUDGE OF THE YEAR

In April, Terry Friedman, Presiding Judge of the Los Angeles County Juvenile Court, was named the Wilmont Sweeney Juvenile Court Judge of the Year by the Juvenile Court Judges of California (JCJC), a section of the California Judges Association. Judge Friedman has served in the Los Angeles Juvenile Court for six years, the last two as presiding judge. He was a member of the California State Assembly from 1986 to 1994 and served as an adjunct professor at Loyola Law School, University of California at Los Angeles (UCLA) School of Law, and the University of Southern California Law Center. He also was a

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# California Courts Declare November Adoption and Permanency Month

## RESOLUTION COINCIDES WITH NATIONAL ADOPTION MONTH

*Blaine Corren, AOC Office of Communications*

The Judicial Council of California has declared November to be Court Adoption and Permanency Month, coinciding with National Adoption Month, to focus attention on California's adoption system. The action was taken at a public meeting in conjunction with a similar action by the Governor's Office.

For the third straight year, the judicial branch is focusing on the need to secure permanent homes for children by encouraging courts and communities to make special efforts to address the importance of adoptions in their counties. With more than 101,000 children in California living apart from their fam-

ilies, and with 13 percent of foster children placed in non-kin care found to be remaining in that care six years later, counties are using Court Adoption and Permanency Month to find children permanent homes.

For example, the Superior Court of Los Angeles County held its 12th Adoption Saturday on November 17, expecting to find homes for 600 children. To date, more than 4,000 adoptions have been finalized on Adoption Saturdays through the volunteer efforts of judges, attorneys, bailiffs, law students, and community volunteers. Alameda County hosted its own Adoption Saturday event

on November 3, where it finalized approximately 75 adoptions.

Nevada and Solano Counties instituted annual Adoption Saturday events. The Nevada County court mounted on a courthouse wall a series of tiles embossed with handprints of the adopted children, along with their first names and the year they were adopted. Solano County erected at its courthouse a permanent wall hanging containing a ceramic mosaic with the handprint of each adoptee. In addition to its commemorative wall, the Solano court held a carnival for the children and their families after their adoption hearings.

### Youth Courts

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had admitted to stealing property, and the court, made up of teens and overseen by Judge Couzens, heard the evidence. The jury of teens deliberated and returned with a decision.

In a workshop, Placer, Los Angeles, and Santa Barbara Counties presented three different models of youth courts. Other workshops covered a wide range of topics, including dealing with gangs, youth court funding, volunteers, mediation, peer/attorney mentoring, legislation, community service, and how youth courts are handling truancy, tobacco use, and curfews.

The conference was organized by the Superior Court of Placer County Peer Court, headed by Judge Couzens and coordinator Karen Green, and the Center for Families, Children & the Courts.

### DID YOU KNOW?

On October 30, **Marlene Simon** was honored by her colleagues upon her retirement from the Administrative Office of the Courts. During her 10 years as a senior research analyst, Marlene directed field operations for each of the Statewide Uniform Statistical Reporting System data collections and consulted on numerous research projects. She was recognized for her groundbreaking research, impeccable professional standards, and collaborative spirit. Her work has been instrumental in describing and evaluating family court services operations across the state. We offer our heartfelt thanks to Marlene for her outstanding contributions.

In  
Appreciation



## Judge Terry Friedman

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staff attorney at the Western Center on Law and Poverty and, for eight years, the executive director of Bet Tzedek in Los Angeles.

Judge Friedman has distinguished himself throughout his career. He was named Legislator of the Year in 1994 by the California Probation, Parole and Correctional Association and the Southern California Public Health Association; was rated the number one Los Angeles Assembly member two different years by the *California Journal*; and received both the American Medical Association's 1994 Dr. Nathan Davis Award for Most Outstanding Contribution to Public Health by a State Legislator and the California Medical Association's 1995 Distinguished Service Award for Outstanding Contribution by a Nonphysician.

Since being elected to the superior court in 1995, Judge Friedman has become a leader in the California judiciary, particularly in matters involving juvenile court. He is a member of the Judicial Council's Family and Juvenile Law Advisory Committee, chairs JCJC, has chaired the California Judges Association's Judicial Elections Committee and the Los Angeles Superior Court's Legislative Committee, has been a member of the Board of Advisors to the UCLA Graduate School of Education and Information, and chairs the Jewish Community Relations Committee's Commission on Government Relations.

In honoring Judge Friedman, the Juvenile Court Judges of California noted in particular his leadership as presiding judge of the Los Angeles Juvenile Court, the largest juvenile court in the world. He has been a forceful voice for the rights of children under the jurisdiction of the court, speaking out on such issues as the need for mental health services for children in the juvenile court and educational services for



children in shelter care and providing leadership to bring together the numerous agencies and governmental entities that serve children and families in Los Angeles. He has been particularly effective in leading JCJC's Legislative Committee. With his extensive background as a legislator, he has turned the committee into an effective voice at the legislature for California's juvenile courts.

Judge Leonard P. Edwards, Supervising Judge of the Family Resources and Dependency Divisions of the Superior Court of Santa Clara County, stated: "Terry Friedman has brought so much to the juvenile court. He is a born leader, at once intelligent, articulate, and sensitive to the needs of the children and families who appear before him. When those talents have been combined with his unique legislative expertise, he has become the juvenile court's most valuable member."

Judge Michael Nash, Supervising Judge of the Los Angeles Juvenile Court's Dependency Division, stated, "As he has done with all of his previous endeavors, Terry has made unparalleled contributions to the juvenile court in Los Angeles and throughout the state because of his energy, his creativity, his leadership, and his desire to make the world a better place."

The Wilmont Sweeney Juvenile Court Judge of the Year Award was first given in 1992 to Judge Wilmont Sweeney, the "dean" of California's juvenile court judges.

## Editor's Note

### WELCOME

to the December 2001 Issue of  
**Update,**  
the Center for Families, Children  
& the Courts (CFCC) newsletter.  
The newsletter focuses on court  
and court-related issues involving  
children, youth, and families. We  
hope you find this issue informative  
and stimulating. As always, we wish  
to hear from you. Please feel free  
to contact CFCC about the events  
and issues that interest you.



**We invite your queries,  
comments, articles, and news.**

Direct correspondence to  
Beth Kassiola, Editor,  
at the e-mail address below.

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Children & the Courts  
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# Tracking Collaborations

## A NATIONAL EVALUATION OF LOCAL EFFORTS TO ADDRESS DOMESTIC VIOLENCE AND CHILD MALTREATMENT

Martha Wade Steketee, Senior Research Associate, National Center for State Courts  
Taj C. Carson, Senior Associate, Caliber Associates

Six sites across the country are taking part in a national experiment to explore the challenges confronting systems that serve families experiencing both domestic violence and child maltreatment. This article provides some background for this project and describes its guiding principles, the implementation sites, and the national and local efforts to evaluate the outcomes.

### Greenbook Guidelines for Domestic Violence and Child Maltreatment

In recent years, the work of many researchers, advocates, professional organizations, and others has brought increased attention to the issue of co-occurring domestic violence and child maltreatment. The National Council of Juvenile and Family Court Judges (NCJFCJ) alone conducted numerous projects in the 1990s focusing on model court programs in family violence, and developed a model code on domestic and family violence. A 1998 publication, *Emerging Programs for Battered Mothers and Their Children*, identified model programs that are working in this area. A follow-up project was initiated to develop guidelines for such programs and practices. This project used a diverse group of leading family court judges, experts on child maltreatment and domestic violence, and representatives from federal agencies to assess and recommend principles of practice in cases where both domestic violence and child maltreatment are present.

The resulting 1999 publication, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* ("Greenbook Guidelines") provides policy recommendations to increase safety for mothers and children experiencing both domes-

tic violence and child maltreatment. It identifies strategies to enhance collaboration among these systems; develop and implement cross-system policy and staff development; improve procedures within each system to better achieve safety and prevent further abuse for battered women and their children and to hold batterers accountable; and seek greater community resources for serving these families.

### Greenbook Implementation Sites

In early 2000, the Office of Justice Programs, U.S. Department of Justice, in collaboration with the Department of Health and Human Services, solicited proposals for projects from communities interested in implementing the Greenbook Guidelines. Ninety responses were received from states, regions, counties, and cities. Eleven community semifinalists were invited to Washington D.C., in June 2000, and representatives from the federal funding agencies and the evaluation team conducted site visits in eight of these communities in September and October 2000. The project implementation demonstration sites were announced on December 12, 2000: Santa Clara County (San Jose); San Francisco; Lane County (Eugene), Oregon; El Paso County (Colorado Springs), Colorado; St. Louis County, Missouri; and Grafton County (Plymouth), New Hampshire. Each site will receive \$1.05 million in federal grants over three years to implement its plans.

### Greenbook Federal, Private, and Technical Assistance Partners

The Greenbook Implementation Initiative is supported by numerous federal agencies. In the Department of Justice, these agencies include the Violence

Against Women Office, Office for Victims of Crime, National Institute of Justice, and Office of Juvenile Justice and Delinquency Prevention. In the Department of Health and Human Services, these agencies include the Children's Bureau, the Office of Community Services of the Administration for Children and Families, the Division of Violence Prevention, the Centers for Disease Control, and the Office of the Assistant Secretary for Planning and Evaluation. Private partners include the David and Lucile Packard, Edna McConnell Clark, and Annie E. Casey Foundations; the National Association of Public Child Welfare Agencies; and the National Council of Juvenile and Family Court Judges.

A technical assistance partnership led by the National Council of Juvenile and Family Court Judges includes the Family Violence Prevention Fund and the American Public Human Services Association. These entities provide training and technical assistance to the six project demonstration sites.

### Evaluating the Greenbook Initiative

The partners in the Greenbook national evaluation are Caliber Associates, the Education Development Center, and the National Center for State Courts. This team works closely with the federal partners and technical assistance providers to give coordinated assistance to the project sites. In addition, each of the local sites has hired one or more local research partners to help with the national evaluation and develop unique local evaluation capacities.

Integral to the evaluation of the entire initiative is the goal of the site projects—to improve the ways the three

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## Tracking Collaborations

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systems (dependency courts, child protective services, and domestic violence service providers) work together and with their broader communities to address problems of families with co-occurring domestic violence and child maltreatment. To do so, the demonstration communities will undertake, within and across systems, changes in such areas as screening and assessment, information sharing, cross-training, safety planning and batterer accountability, service provision, case management, and advocacy. The short-term goals for each site include developing a governance structure for the decision-making and implementation process, improving policies and practices, building internal and cross-system capacity, and establishing common and consistent responses to families. The idea is that identified system changes will result in improved safety, reduced repeat abuse, and greater batterer accountability. *The challenge for the national evaluation is to capture these changes in meaningful detail.*

The evaluation of this demonstration offers an opportunity to document community progress toward achieving the goals articulated by the Greenbook Guidelines. The evaluation will also follow selected cases through the child protection system and the courts and document the outcomes for mothers, children, and perpetrators. The evaluation results will inform communities nationwide about more balanced and judicious interventions to protect women and children.

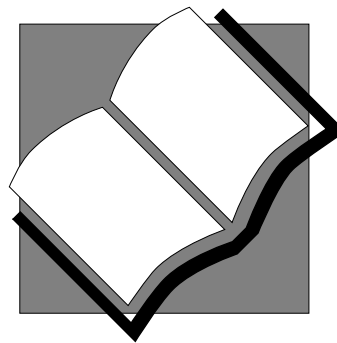
## Greenbook Implementation Initiative Activities to Date

The Greenbook Implementation Initiative involves collaboration at many levels—among all the federal and private funding partners, the evaluation partners, and the technical assistance partners. Representatives from the federal funding agencies, the evaluation team,

and the national technical assistance partners have made visits to the sites at regular intervals during this first project year. The evaluation plan is being implemented with input from an advisory board of national experts. All federal, research, technical assistance, and project team partners in the initiative meet twice a year. The first “all-site” meeting was held in Washington, D.C., in April 2001, and the second was held in St. Louis in October 2001.

*Martha Wade Steketee, M.S.W., joined the Washington office of the National Center for State Courts’ Research Division as a senior research associate in July 1999. She has almost 20 years’ experience in studying and evaluating child welfare, juvenile justice, and other programs for children and families and in assessing and establishing volunteer advocacy programs for children in the child protection system. Her current and recent work at the National Center includes evaluating court-based domestic violence case processing and related issues; evaluating interdisciplinary and interorganizational initiatives to address both child maltreatment and domestic violence; developing measures of child and family welfare-focused court caseload and judicial workload; assessing the practices of judges and court administrators and ensuring the participation of victims of crime in the court process; and developing model policy to address public access to electronic court case records. Ms. Steketee received an undergraduate degree from Harvard College, an M.S.W. with a specialty in child welfare policy from Washington University in St. Louis, and additional doctoral training at the University of Michigan and University of Pittsburgh.*

*Taj C. Carson, Ph.D., is a senior associate at Caliber Associates. She currently serves on the national evaluation team for the Greenbook Implementation Initiative. In addition, she is part of the evaluation design team for the Safe Start Initiative, funded by the Office of Juvenile Justice and Delinquency Prevention. She was formerly the project director for the Juvenile Justice Evaluation Center at the Justice Research and Statistics Association (JRSA). In 1999 she received a doctorate in sociology from the University of Delaware. Prior to her employment at JRSA, Dr. Carson was an assistant professor of criminal justice at Northern Arizona University. She has served as a program evaluator for social service agencies,*



*has done her own research in an academic setting, and has participated in community work on a variety of issues.*

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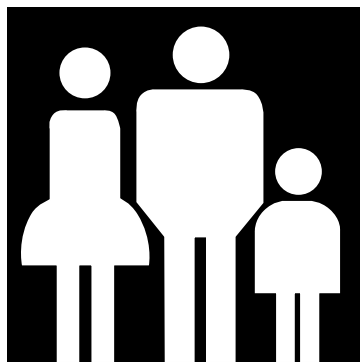
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# Access to Visitation Program Awards Grant Funding for Fiscal Year 2001-2002

Shelly Danridge, Access to Visitation Coordinator

The Judicial Council's Executive and Planning Committee, on behalf of the Judicial Council, approved the allocation of \$800,000 in available federal Access to Visitation Grant funds to 14 administrative superior courts representing 28 counties. The Access to Visitation Grant funds are awarded annually to the administrative superior courts through a competitive request-for-proposals process.



Funding to all states from the Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, for child access and visitation grant programs was established under section 391 of the Personal Responsibility and Work Opportunity Reconciliation Act ("welfare reform") of 1996 (Pub. L. 104-193, 110 Stat. 2258), Title III, Subtitle I—Enhancing Responsibility and Opportunity for Nonresidential Parents, section 469B of the Social Security Act. The federal funding allo-

cation to each state is based on the number of single-parent households. California has the most single heads of households in the United States and therefore receives the largest portion of federal funds.

The purpose of the federal grant program is to enable states to establish and administer programs to support and facilitate noncustodial parents' access to and visitation of their children. All family courts throughout California are eligible to apply for and receive the Access to Visitation Grant funds. In California, funding is limited to three types of programs:

- Supervised visitation and exchange services;
- Education about protecting children during family disruption; and
- Group counseling services for parents and children.

The Judicial Council's Center for Families, Children & the Courts administers and provides oversight for the grant program and works closely with the council's Family and Juvenile Law Advisory Committee. The latter established a Selection and Review Subcommittee to review and evaluate needs and develop the funding recommendations that are submitted to the council each year through its Executive and Planning Committee.

Congratulations to the following recipients of grant funding for fiscal year 2001-2002. For additional information regarding particular programs or the Access to Visitation Grant Program, please contact Shelly Danridge, Access to Visitation Grant Coordinator, 415-865-7565.

**CONTRA COSTA COUNTY:** The *Responsive Supervised Visitation Program (RSVP)* is a single-county, single-site program offering supervised visitation and neutral exchange services, parent education, and group counseling services for families. The program aims to provide, on a sliding fee scale, supervised visitation and exchange services to families not currently being served because of limited financial resources or language barriers, and a parenting program and group counseling for low-income parents in chronic conflict.

**LOS ANGELES COUNTY:** The *Safe Access and Friendly Exchanges for Kids (SAFE for Kids) Program* will continue to offer children safe, ongoing access to their noncustodial parents by providing on-site, low-fee supervised visitation and neutral exchange services to families throughout Los Angeles County. The program will collaborate with five SAFE for Kids nonprofit agency sites to provide annual training and coordinate with community domestic violence shelters in establishing policies and practices for safe and appropriate contact between children and noncustodial parents who have been affected by domestic violence.

**MENDOCINO COUNTY:** The *North Coast Family Access and Opportunities Program* is part of a, multisite, tri-county (Mendocino, Humboldt, and Del Norte) comprehensive partnership proposing the continuation of supervised visitation and exchange services and parent education for parents and children experiencing separation or divorce. The goal of the program is to ensure safe and positive regular contact between parents and their children and provide parents with essential tools to develop the necessary interpersonal skills to have healthy, ongoing relationships with their children, while facilitating their compliance with custody or visitation orders of the court, regardless of the ability to pay for services.

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## Access to Visitation

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**MERCED COUNTY:** The *Children's Access to Parents (CAP) Program* is provided by the nonprofit agency Child Advocates of Merced County. CAP is a single-county program that proposes to continue providing supervised visitation and exchange services for parents and children. The program will seek to expand its services to the Los Baños, Dos Palos, and Gustine areas and provide bilingual services to accommodate Spanish-speaking children and their parents.

**NAPA COUNTY:** *Napa Access* is a single-county part of a comprehensive partnership that will offer supervised visitation and exchange services to parents and children (ordered by the court or referred), parent education, and group counseling services for both parents and children. The Superior Court of Napa County will also provide counseling workshops for parents and children through COPE Family Center and make appropriate referrals to agencies serving both custodial and noncustodial parents for supervised visitation or monitored exchanges.

**SACRAMENTO COUNTY:** The *Access to Visitation Program* is part of a comprehensive partnership representing five collaborating counties (Sacramento, Placer, Yolo, Solano, and San Joaquin) that will continue providing supervised visitation and exchange services for parents and children. The program aims to respond to the needs of children caught in the middle of divorce, domestic violence, and other high-conflict family circumstances. The specific goals of the program are to promote continuous access of noncustodial parents to their children; reduce the emotional trauma and risk of abuse or abduction facing children who spend unsupervised time with a parent with a history of violence or abuse; improve compliance with court orders; and assist family courts in resolving visitation and custody disputes.

**SAN BERNARDINO COUNTY:** The *Parents and Children Together Safely (PACTS) Program* is a single-county part of a comprehensive partnership seeking the continuation of supervised visitation and exchange services for parents and children. The goals of the program are to increase the accessibility of nonresidential parents to their children by expanding the demonstration center where parents can visit their children under the supervision of trained staff and a trained security officer; provide for the emotional and physical safety of parents and children by providing a monitored, neutral exchange location where children can be transferred from one family member to another for visitation; provide group counseling and parent education for children involved in highly conflicted custody cases; and offer a network of services provided by agencies within the community.

**SAN DIEGO COUNTY:** The *San Diego Kids' Turn Program* is a single-county program with multisite services seeking the continuation of parent education for families in San Diego County. The program aims to provide, at low cost on a sliding scale, prevention and intervention workshops to improve the communication skills of both parents, reduce parental conflict, prevent harm to children, and reduce demands on the family court system.

**SAN FRANCISCO COUNTY:** The *Family Cohesion Collaborative Program* of the Superior Court of San Francisco is part of a multisite comprehensive partnership (San Francisco and Alameda Counties), that will provide supervised visitation and exchange services for families in San Francisco and Alameda Counties through the Rally Visitation Program of the Saint Francis Memorial Hospital. The overall goals of the program are to provide high quality, affordable supervised visitation and monitored exchange services and to enhance parent education as a means of improving the well-being of children involved in court-ordered parent visitation arrangements. The

collaborative aims to strengthen both custodial and noncustodial parents as caregivers while lessening negative impacts on children.

**SANTA BARBARA COUNTY:** The *Parental Access Program Alliance (PAPA)* is a multisite, multicounty (Santa Barbara, San Luis Obispo, and Ventura) program that provides low-income families with supervised visitation and exchange services, counseling services, and education programs about protecting children during family disruption. The program goals are to provide high-quality services and expand program sites and the numbers of clients served; teach parents problem-solving skills that facilitate their disengagement from conflict; and continue to improve parenting plans and family functioning for the clients.

**SANTA CLARA COUNTY:** The *Connections for Kids Program* is part of a multisite, multicounty (Santa Clara and San Mateo) comprehensive partnership program seeking the continuation of safe access for children and their parents through supervised visitation and exchange services. The goals of the program are to increase children's access to their noncustodial parents and increase the parents' sense of responsibility for the welfare of their children; reduce the trauma to children caused by family dissolution and conflict; and improve the quality of parent-child relationships.

**SHASTA COUNTY:** The *Access to Visitation Unified Parent Access Program* of the Superior Court of Shasta County is a multisite, multicounty collaborative program encompassing family courts from four North State counties (Shasta, Siskiyou, Trinity, and Tehama) and several nonprofit agencies that will provide supervised visitation and exchange services for nonresidential parents; parent education; and group counseling services for parents and children. The program aims to facilitate noncustodial parental access, improve parental visitation, and, through education and counseling services, help both parents build

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# Summary of Newly Adopted Rules, Forms, and Standards

The following is a list of rules, forms, and standards adopted by the Judicial Council on October 26, 2001, that directly affect juvenile and family proceedings. For a complete list of rules, forms, and standards, please visit [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov).

## ■ Interlocutory Appeals of Bifurcated Issues in Family Law Cases (amend Cal. Rules of Court, rule 1269.5)

Revised a rule to clarify that a party's failure to move for certification or for permission to appeal on a bifurcated issue does not preclude review of that issue after a final judgment.

## ■ Family Law: Forms to Establish Parental Relationship and Child Support in Title IV-D Cases (revoke forms 1298.1, 1298.02, 1298.08, 1298.10, 1298.11, and 1298.12)

Revoked forms that have been superseded by more recently adopted forms that serve the same functions.

## ■ General Family Law Forms and New Change-of-Address Form (revise forms 1296.70, 1296.75, 1285, 1285.10, and 1285.60; approve forms FL-585 and MC-040)

Approved and revised forms to correct a technical error, clarify procedures, and improve proceedings involving families.

## ■ Family Law: Renumbering All Forms (renumber forms 1281–1299, forms commencing with DV and OMB, and form MC–150)

Adopted a new numbering system for all family law forms including domestic violence, governmental support, uniform parentage, and required federal forms in order to increase the ability to locate needed forms. The committee also recommends revising forms to make clerical and technical changes to conform to statutory amendments and to increase uniformity in the forms.

## ■ Governmental and Family Law Forms for Initiating and Processing Child Support Cases (revise forms 1298.09, 1299.01, and 1299.04; approve forms 1285.66 and 1296.32; adopt form 1299.02)

Adopted and revised forms to provide an efficient format for drafting Title IV-D pleadings and orders, expedite entry of orders after hearing, and create a specialized notice and acknowledgment of receipt for governmental forms.

## ■ Domestic Violence Training Standards for Court-Appointed Child Custody Investigators and Evaluators (amend Cal. Rules of Court, rule 1257.7)

Revised the rule specifying domestic violence training standards in order to provide greater opportunities for meeting training standards and necessitating that the council approve of training that fulfills requirements.

## ■ Court-Connected Child Custody Mediation: Written Notice of Limitations on Confidentiality (amend Cal. Rules of Court, rule 1257.1)

Revised the rule providing standards for court-connected mediators to require that they provide written notice of the limitations on confidentiality to the litigants they serve.

## ■ Family Court Services: Domestic Violence Protocol (adopt Cal. Rules of Court, rule 1257.2)

Adopted a rule that provides a protocol for family court services programs' handling of domestic violence cases as required by statute.

## ■ Juvenile Joinder (adopt Cal. Rules of Court, rule 1434; adopt form JV-540)

Adopted a rule and form to provide protocols and notice for joinder of government agencies and private service providers in juvenile court proceedings where the agency or service provider is alleged to have failed to meet a legal obligation to provide services to a child under the juvenile court's jurisdiction.

## ■ Juvenile Dependency: Health and Education Information (amend Cal. Rules of Court, rule 1441)

Amended the rule for obtaining health and education information from the child's parents or guardians on a juvenile dependency petition, to specify when and how the form is to be completed and distributed.

## ■ Juvenile Dependency: Modification Petition Attachment (revise form JV-180)

Revised a form to clarify the juvenile court's orders and findings.

## ■ Juvenile Law: Caregiver Information Form (approve form JV-290)

Approved a form to provide a uniform way for foster parents and relative caregivers to submit information in advance of juvenile court hearings.

## ■ Minors' Compromises and Blocked Accounts: New Rules and Mandatory Forms (adopt Cal. Rules of Court, rules 378 and 7.950–7.954; repeal rule 241; adopt forms MC-350, MC-351, MC-355, MC-356, MC-357, and MC-358)

Adopted rules and statewide forms to give guidance to parties seeking to compromise cases involving claims of minors and incompetent persons and to give appropriate information to courts.

## ■ Family Law Information Centers and Family Law Facilitator Offices: Guidelines for Operation (adopt Cal. Rules of Court, appendix, div. V)

Adopted guidelines on operating family law information centers and facilitator offices to help court clerks provide improved and increased customer service, particularly for self-represented litigants.

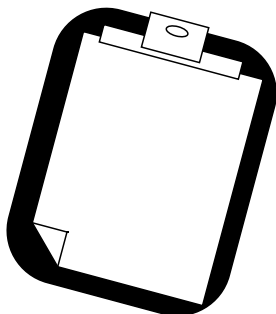
## Access to Visitation

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a healthy and lasting relationship with their children. This program will involve support, intervention, education, and therapeutic services to prevent future conflict and harm to children.

**SONOMA COUNTY:** The *Visitation Enhancement Program* is a single-county part of a comprehensive partnership with two nonprofit agencies that proposes to continue furnishing parent education and supervised visitation and exchange services. The program will provide safe, positive contact for children with parents in order to encourage parents to support and care for their children; provide parents with opportunities to show compliance with court orders; offer referrals to parent education and other helpful services; and assist parents in the transition to unsupervised visits.

**TULARE COUNTY:** The *Supervised Visitation Program* of the Superior Court of Tulare County, in partnership with the Kings County Probation Department's Family Court Services and the Superior Court of Kings County, will join with Family Services of Tulare County, a nonprofit agency, to provide families with supervised visitation and exchange services and provide education for non-custodial parents and their children, while reducing or eliminating fees for low-income parents, in order to accommodate families not currently being served. The goal of their program is to support the access of noncustodial parents to their children in a manner that is safe and reduces harm and trauma to the child.



# RAISING THE LEVEL OF DIALOGUE REGARDING THE LINK BETWEEN CHILD MALTREATMENT AND JUVENILE DELINQUENCY: FRAMING THE AGENDA FOR THE FUTURE

John A. Tuell, Director,  
*Juvenile Justice Division of the Child Welfare League of America*

The Child Welfare League of America (CWLA) established the Juvenile Justice Division in July 2000 through a grant award from the John D. and Catherine T. MacArthur Foundation. It is the intention of the Juvenile Justice Division of CWLA to help frame the national agenda for the future and to assume a strong position of national leadership in the integrated work of the child welfare and juvenile justice systems on behalf of children, youth, families, and communities.

The Juvenile Justice Division serves the overall mission of the Child Welfare League of America on behalf of children and families involved in both the juvenile justice and child welfare systems. This is accomplished by:

- Providing national leadership in promoting juvenile justice and child welfare systems coordination and integration.
- Collecting, analyzing, and disseminating information on child welfare and juvenile justice practices and policies that promote positive youth development.
- Advocating for implementation of sound legislation, policies, and procedures that contribute to juvenile justice system reform and improvement and to the development of effective delinquency prevention and intervention programs and practices.
- Promoting the development and implementation of effective community-based intervention and treatment alternatives to reduce the

reliance on incarceration for accused or adjudicated delinquent youth.

- Providing consultation, training, and technical assistance resources to implement systems integration and reform and to implement appropriate and effective responses to reduce juvenile delinquency and juvenile victimization.

The Juvenile Justice Division of the Child Welfare League of America is committed to working with and through its member agencies in activities to reduce the incidence of juvenile delinquency nationwide. We are also working to reduce reliance on incarceration for accused or adjudicated delinquent youth as we work collaboratively to achieve our stated mission.

With the arrival of Shay Bilchik in 2000 as CWLA's ninth executive director, the League renewed its commitment to and continued its advocacy and leadership on behalf of children and families. As the Juvenile Justice Division embarks on this challenging venture, it is useful to examine some current data trends that help to paint a picture of the juvenile justice and child welfare landscape.

The body of research on the connection between child maltreatment and juvenile delinquency, while utilizing a variety of methodologies, leads to a similar conclusion: that, "in general, people who experience any type of maltreatment in childhood ... are more likely than people who were not maltreated to be arrested later in life" (Widom, C. S.,

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## Raising the Level of Dialogue

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1995). More recently, in a report released by the National Institute of Justice (*Research in Brief: An Update on the Cycle of Violence*, Widom, C. S., and Maxfield, M. G., February 2001), the study findings revealed that persons who had been abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent. More specifically, those abused or neglected as children were more likely (than a nonabused or nonneglected comparison group) to be arrested as juveniles (27 percent versus 17 percent), as adults (42 percent versus 33 percent), and for a violent crime (18 percent versus 14 percent).

There are some encouraging and discouraging trends reflected in the following data. While there is clear and convincing evidence that there is a downward turn in virtually every major category of juvenile delinquency, the data also reflect disturbing numbers of children who are the victims of abuse and neglect, a result of the increases in the 1980s and 1990s. Although the decrease in delinquency reflects a greater national focus on the issue and the use of more effective programs to attack the problem, it is clear we must do more. The research has increasingly established and reaffirmed the connection between abuse and neglect and juvenile delinquency. If we are to realize our mission and our vision for the nation's children, youth, and families and see an even more substantial and sustained reduction in juvenile delinquency, our goal to more effectively integrate and coordinate the juvenile justice and child welfare systems becomes imperative.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) published the *Juvenile Offenders and Victims: 1999 National Report*, which reflects the continuing decline in violent juvenile crime and overall juvenile delinquent activity. While the period from 1987 to

1993 witnessed alarming increases in juvenile delinquency, the past six years have seen equally remarkable declines. With respect to juvenile violence and victimization, some highlights include:

- According to the 1999 FBI Uniform Crime Reports (UCR) data, there was a 68 percent decline in homicides committed by youth from 1993 to 1999.
- The number of juvenile arrests declined in every violent crime category despite 8 percent growth in the juvenile population from 1993 to 1999.
- One-third of 1 percent of juveniles ages 10–17 were arrested for a violent crime in 1999.
- 670,000 arrests of females were made in 1999. This figure continues to rise and now accounts for 27 percent of all juvenile arrests.
- The juvenile population in 1999 was 79 percent white. In contrast, 41 percent of juvenile arrests for violent crime involved black youth. Black youth were also overrepresented in juvenile property crime arrests.

The Federal Interagency Forum on Child and Family Statistics released the fifth annual report in its series entitled *America's Children: Key National Indicators of Well-Being, 2001* and some of the significant findings reflect the following:

- There were estimated to be nearly 3,000,000 referrals for child maltreatment received in 1999, almost one-third (29.2 percent) resulted in a disposition of substantiated or indicated child maltreatment (a total of 826,000 victims nationwide).
- In 1999 an estimated 1,100 children died of abuse and neglect, a rate of approximately 1.62 deaths per 100,000 children in the general population (rate has remained stable over the past five years of reporting).
- Since the peak years of rates of use of illicit drug use between 1992 and 1996, the disturbing rates of use (e.g., 23 percent among 10th-graders) have remained stable.

- Children younger than one year accounted for 42.6 percent of the child maltreatment fatalities, and 86.1 percent were younger than six years of age.
- As of September 30, 1999, there were an estimated 568,000 children in foster care.

These figures offer a snapshot of the issues that confront all child-, youth-, and family-serving agencies and organizations as we move headlong into the 21st century. The numbers paint a complex picture of concerns that we must address collaboratively through the formation of strategic partnerships. There is reason for hope in some of the highlights, and sufficient evidence contained in other significant points extracted from the reports for us to understand that we must redouble our efforts to collaboratively implement systems integration, and form and institutionalize strategic partnerships across all domains to achieve positive outcomes.

With the intention of the Juvenile Justice Division to help frame the national agenda for the future, it is therefore our charge to put forth action steps that move us toward achievement of the articulated goals and objectives. The exciting and energizing challenge already has some positive foundations on which we may build.

The Juvenile Justice Division initiated work by forming a National Advisory Committee on Juvenile Justice (NACJJ) with broad national representation, and developing educational and informational publications (e.g., *The Link*, a quarterly newsletter; a fact sheet describing the division; a PowerPoint presentation bringing to life the information contained in the full version of this piece; a summarized list of current, relevant publications that serve to clarify the connection between child maltreatment and juvenile delinquency; and a comprehensive literature review on the connection between child maltreatment and juvenile delinquency). The work of the staff has included workshop presentations

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## Raising the Level of Dialogue

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and the delivery of training at the CWLA National and Regional Conferences, planning for a CWLA National Summit on juvenile justice and child welfare issues, establishing liaisons with other youth service and juvenile justice organizations, and developing a dynamic new juvenile justice link to the CWLA Web site's home page. The Juvenile Justice Division is also already active in developing strategic partnerships in states and communities to advocate for a more balanced approach to the implementation of service delivery and program development. There is also active engagement with collaborations and coalitions involved in the review and advocacy, either for or against, pending legislation and existing policy.

The challenging and exciting work on behalf of children, youth, families, communities, and neighborhoods throughout

the country remains ahead for all of us working for the improved integration and enhanced functioning of juvenile justice and child welfare systems. The scope and nature of the work ahead have been articulated and are far-reaching and ambitious.

The Juvenile Justice Division of CWLA challenges all persons to actively engage in the effort to create a new level of dialogue about the integration of the child welfare and juvenile justice systems, to shape effective legislation and promote sound policy formation, and to participate in framing the agenda for the future.

*John A. Tuell is currently serving as the Director of the Juvenile Justice Division for the Child Welfare League of America (CWLA). He previously served as the Deputy Director of the State and Tribal Assistance Division in the Office of Juvenile Justice and Delinquency Prevention (OJJDP) where, among his primary supervisory duties, he had responsibility for managing of the Comprehensive Strategy Initiative and the Juvenile Accountability Incentive*

*Block Grant (JAIBG) Program. Mr. Tuell joined OJJDP in 1997 after working in the Fairfax County, Virginia, Juvenile and Domestic Relations District Court for 17 years in a variety of practitioner and administrative capacities. Mr. Tuell earned his Master of Arts degree in Criminal Justice from George Washington University and his Bachelor of Social Work degree from James Madison University.*

*Adapted with permission from J. A. Tuell, Raising the Level of Dialogue Regarding the Link Between Child Maltreatment and Juvenile Delinquency: Framing the Agenda for the Future (Child Welfare League of America, 2002).*

*The entire article will be available on the Child Welfare League of America (CWLA) Web site at [www.cwla.org](http://www.cwla.org) in January 2002 (click on "Programs" and go to the Juvenile Justice Division link), or you may obtain a copy by contacting the CWLA Juvenile Justice Division information specialist, Sheryce Parrish, at 202-942-0309 or [sparrish@cwla.org](mailto:sparrish@cwla.org).*

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# Child Support Isn't Always From Income

Richard C. Vogl, Commissioner, Superior Court of Orange County

**N**oncustodial parents who pay child support commonly believe that the child support will be based solely upon their income. It is true that in the bulk of cases in this state child support is determined by looking at the actual earnings of the payor. This is as it should be under Family Code section 4058(a). Yet the statutes and case law of California permit child support from other sources as well. The existence of these other "theories" upon which a court may rely in determining a fair order for child support is not well known.

## NEW SPOUSE INCOME

For instance, a new spouse's income or the income of a nonmarital partner may be used by the court in setting child support. This theory is not often used and may occur only in an extraordinary situation, but Family Code section 4057.5(b) specifically permits the court to follow this course when a parent has voluntarily or intentionally quit working or reduced his or her income.

## PRESUMED INCOME

If the local child support agency is seeking a support order where no income information whatsoever is known, should the court order nothing? Of course not. Some courts then follow Welfare and Institutions Code section 11452, which provides that the court may order a sum equal to the "minimum basic standards of adequate care." For a case involving only one child, the court would order a support sum of \$341. In the absence of any information about the income of the noncustodial parent, some courts would order child support based upon the payor's having a job at minimum wage. In that case, the order would be \$230 per month.

In either event, the order thus made is subject to the set-aside provisions of Family Code section 17432, providing that the motion is filed within the proper time period.

But the monthly paycheck and presumed income are not the only theories available to the court.

## INVESTMENTS

The court may also look to investments of the payor. Family Code section 4008 makes a specific reference to this as a basis. (See *Rosenthal v. Rosenthal* (1961) 197 Cal.App.2d 289; *In re Marriage of Stich* (1985) 169 Cal.App.3d [214 Cal.Rptr 919]; and *In re Marriage of Dick* (1993) 15 Cal.App.4th 144 [18 Cal.Rptr.2d 743].)

## CAPACITY

The court may also make a determination of the capacity of the payor to earn money to support his or her family. Family Code section 4058(b) provides for this theory, and it was followed in *In re Marriage of Paulin* (1966) 46 Cal.App.4th 1378 [54 Cal.Rptr.2d 314]. Pursuant to *In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, of course, there is a three-pronged test that must be satisfied before a court may apply the "capacity-to-earn standard" and order child support:

Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience, and qualifications; (2) the willingness to work, exemplified through good faith efforts, due diligence, and meaningful attempts to secure employment; and (3) an opportunity to work, which means an employer who is willing to hire.

(See also *Paulin, supra*, 46 Cal.App.4th.)

It is important to remember the limitations established by *In re Marriage of Simpson* (1992) 4 Cal.4th 225 [14 Cal.Rptr.2d 411], however, which determined that the standard should be based upon "reasonable work regimen, and not excessive hours or excessive overtime."

In the case of *In re Marriage of Carlsen* (1996) 50 Cal.App.4th 212, the court said, "In determining whether an amount of support will allow minors to enjoy a station in life commensurate with their parents, the court need not scrutinize the living circumstances of the parents in exacting detail." (See also *Estevez v. Superior Court* (1994) 22 Cal.App.4th 423 [27 Cal.Rptr.2d 470].)

## LIFESTYLE

Family Code section 4053(f) states that children should share in the standards of living of both parents. The court stated in *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87 [91 Cal.Rptr.2d 374] that section 4053 sets forth the criteria underlying the child support guidelines. Courts are required to adhere to these criteria, which provide that a child needs support at a level commensurate with both parties' abilities and standards of living.

In *McGinley v. Herman* (1996) 50 Cal.App.4th 936 [57 Cal.Rptr.2d 921], the court specifically stated that children are entitled to share in the standards of living of both parents. It was held that where a trial court makes an order for child support that does not relate to the father's standard of living and he has extraordinarily high income, the award should be reversed.

It would seem, then, that inquiry by the court into the "lifestyle" of the noncustodial parent is always proper. (See *Straub v. Straub* (1963) 213 Cal.App.2d 792 [29 Cal.Rptr 183].) Justice D. Sills, in an unpublished opinion, has stated:

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## Child Support

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Although application of the “lifestyle” theory in determining child support is similar to the “ability to pay” theory, it is different. It does not look to whether the supporting parent is deliberately attempting to avoid meeting the parent’s financial responsibility to the child by, for example, hiding the money. Rather, it looks to the lifestyle decisions the supporting parent has made.

Justice Tobriner said in *Meagher v. Meagher* (1961) 190 Cal.App.2d 62 [11 Cal.Rptr 650]:

Instead of narrowly circumscribing the trial court to consideration of the single aspect of the husband’s current earnings, the cases wisely permit an examination of the *total situation*.

In *In re Marriage of Catalano* (1988) 204 Cal.App.3d 543 [251 Cal.Rptr 543], the court said:

Where the supporting parent enjoys a lifestyle that far exceeds that of the custodial parent, child support must to some degree reflect the more opulent lifestyle even though this may, as a practical matter, produce a benefit for the custodial parent.

In 1990 Justice King in *In re Marriage of Young* (1990) 224 Cal.App.3d 147 [273 Cal.Rptr 495] stated:

The law requires that child support be set and modified in accordance with the living standards of both parents in mind—at a level beyond the bare necessities of life.

### WHAT IS INCLUDED?

In *Stewart v. Gomez* (1996) 47 Cal.App.4th 1748 [55 Cal.Rptr.2d 531], it was held that a court may consider earning capacity together with disability benefits, rent-free housing, and meal allowance as gross income under Family Code section 4058.

In *In re Marriage of Kirk* (1990) 217 Cal.App.3d 597 [266 Cal.Rptr 76], the

court specifically found that trial courts should consider money otherwise spent for expenses.

Justice Sheila Prell Sonenshine in *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212 [45 Cal.Rptr.2d 555] said:

Once persons become parents, their desires for self-realization, self-fulfillment, personal job satisfaction, and other commendable goals must be considered in context of their responsibilities to provide for their children’s reasonable needs. If they decide they wish to lead a simpler life, change professions, or start a business, they may do so, but only when they satisfy their primary responsibility: providing for the adequate and reasonable needs of their children.

If the order is based upon “standard of living,” is it proper or improper to still permit a “hardship” for the payor for the additional children he or she supports? It would seem [improper,] as a hardship is permitted to reduce income from a gross sum, but if consideration is merely given to “expenses,” the logic of giving a hardship disappears.

If the order is based upon standard of living, may the court exclude any consideration of the income of the new spouse? This is an interesting question and is yet unanswered by the Courts of Appeal.

If the order is based upon standard of living, may the court exclude any consideration of realty taxes paid by the payor? It would seem so, since the issue of realty taxes comes up only because

the payor has claimed a deduction from income taxes due to the payment. If the order is based on what the payor spends, the logic of giving such a consideration disappears.

If the order is based upon standard of living, may the court exclude any consideration of interest paid on a realty mortgage? Of course, the issue of realty mortgage interest comes up only because there is a deduction from income taxes due to the payment, but if the order is based on what the payor spends, the logic of giving such a consideration disappears.

If the order is based upon standard of living, may the court exclude any consideration of taxes paid from “income”? Of course, there should be no deduction for income taxes if the order is based on what the payor spends.

### IS IT UNFAIR?

When an order is made for child support from the theory of “lifestyle,” it will inferentially aid the custodial parent as well. Should the court refrain from making such an order because of that? That doesn’t seem to be the case. In the case of *In re Marriage of Hubner* (1988) 205 Cal.App.3d 660 [252 Cal.Rptr 428], the court stated:

The core of this dispute is whether the trial court, in setting child support, should focus on the noncustodial parent’s wealth or the custodial parent’s poverty. We conclude that the primary focus must be on the parent’s wealth, and that the trial court must frame its orders to assure, as best the court can, that the wealth flows to the child, and not to the custodial parent.

Will an order based upon a person’s standard of living or lifestyle be upheld by the appellate courts? Under the established principles of substantial evidence that govern an appellate court’s review, the record must reflect ample evidence of the expenses of the noncustodial parent and what that person

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## Child Support

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spends. If it does, the order should stand the test of an appeal. The Court of Appeal will again make "every reasonable inference and resolve all conflicts" in favor of this decision. (See *In re Marriage of Mix* (1975) 14 Cal.3d 604 [122 Cal.Rptr 79] and *In re marriage of Trantafello* (1979) 94 Cal.App.3d 533 [156 Cal.Rptr.2d 556].) Remember, all issues of credibility are within the province of the trier of fact alone. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920 [101 Cal.Rptr 568].)

In short, when a parent consistently expends great sums each month for his or her own support, the court should consider standard of living in setting child support.

### THE CHILD'S MONEY

Another theory that may be employed by a court in ordering child support is the use of the child's own money. This is set forth in Family Code section 3902 and would presumably arise where the child has an estate that would supply funds greater than the ability, capacity, or income of the parents enables them to provide.

### EVIDENCE

For the court to make fair orders from the various theories available to it, counsel should have available:

1. IRS returns—see Family Code sections 3552 and 3665;
2. Pay stubs (self-employed parties must submit profit and loss statements with the *Income and Expense Declaration*);
3. The calculated overtime for "normal work regimen" per *Simpson, supra*;
4. Evidence if a "hardship" applies as per Family Code section 4071;
5. Evidence of the visitation factor; and
6. Health insurance information as per Family Code section 3751.

Furthermore, *Marriage of Lusby* (1998) 64 Cal.App.4th 459 [75 Cal.Rptr.2d 263] held that Family Code section

4062 provides for orders of additional child support beyond the guideline sum. This can be for the purpose of paying child-care costs related to employment, education, or training and for the purpose of paying reasonable uninsured health-care costs. Courts may also order additional support for education or other special needs of the children, or travel expenses for visitation. The Legislature has created two categories of support: the basic guideline and additional support. It would seem that orders for support may not be reduced due to the high expenses of the paying party. (See *In re Marriage*

*of Denise and Kevin C.* (1997) 57 Cal.App.4th 1100 [67 Cal.Rptr.2d 508].)

*A certified specialist in family law, Commissioner Richard Vogl (Loyola University School of Law, 1968) has served on the Superior Court of Orange County for 14 years. In addition to editing the "Family Law Corner" in Orange County Lawyer magazine for 12 years, Commissioner Vogl has taught family law at Chapman University School of Law for the last 6 years. Now assigned as an AB 1058 child support commissioner, he recently served on the P3 Project (Policies, Procedures, and Practices), working with the new state Department of Child Support Services.*

# Special Immigrant Juvenile Status and the Violence Against Women Act

## ASSISTING IMMIGRANT CHILDREN IN DEPENDENCY AND/OR DELINQUENCY PROCEEDINGS

*Katherine Brady, Senior Attorney, Immigrant Legal Resource Center*

One out of five California residents is foreign-born. A vast number of families in California either are all immigrant or include both U.S. citizens and immigrants. Immigration status—or the lack of it—is of enormous concern to these families. This status can be drastically affected by orders made in California juvenile, family, and criminal courts.

State courts can help many victims of abuse obtain critical immigration benefits through the Special Immigrant Juvenile Status (SIJS) law and the immigration provisions of the Violence Against Women Act (VAWA). Certain children under juvenile court jurisdiction are legally entitled to lawful permanent residency (a "green card") under the SIJS law—but only if they apply while they remain under state juvenile court jurisdiction. Tragically, each year hundreds of children are released from court jurisdiction without applying for SIJS. Having spent years in

foster care, these children are left to face needless nearly insurmountable hurdles in their transition to adulthood: as undocumented immigrants, they will not be able to work legally in the United States or attend state college, and they will live in constant fear of deportation.

This article briefly discusses the SIJS and VAWA laws and provides information about further resource materials regarding these and other immigration consequences of state court decisions.

### SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN IN DEPENDENCY OR DELINQUENCY PROCEEDINGS

Part of the federal immigration law, SIJS permits certain immigrant children who are under state juvenile court jurisdiction to obtain lawful permanent resident status based upon findings and orders made by the juvenile court.<sup>1</sup> For the child

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## Assisting Immigrant Children

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to qualify, a juvenile court in the United States must either have made the child a dependent or have legally placed the child under the custody of a state agency or department. The child must be “deemed eligible for long-term foster care due to abuse, neglect or abandonment.” Federal regulation defines “deemed eligible for long-term foster care” to mean that a court has found that family reunification is no longer a viable option.<sup>2</sup> Finally, the juvenile court must find that it is not in the child’s best interest to be returned to the home country.

In *dependency proceedings*, SIJS is available to a child in the permanent planning phase, when reunification efforts with the parent have been terminated. The child may proceed to foster care, adoption, or guardianship and remain eligible, but the court must retain jurisdiction.<sup>3</sup>

Children in *delinquency proceedings* also qualify for SIJS in certain circumstances—for example, when the court cannot release a child on probation to the parents due to abuse, neglect, or abandonment and instead the child goes on to foster care or guardianship. Although the Immigration and Naturalization Service (INS) has not written formal comments regarding delinquency and SIJS and therefore is not a risk-free application, in practice INS offices have granted SIJS to children in delinquency proceedings.

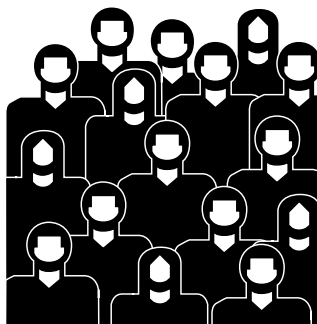
A few delinquency dispositions can block a child from obtaining any immigration status by making the child “inadmissible” under the immigration laws.<sup>4</sup> The most dangerous finding is sale of drugs or possession of drugs for sale (as opposed to simple possession). Many other juvenile delinquency dispositions, including many offenses involving violence or theft, do not cause immigration problems. Expert immigration advice is necessary for any child in delinquency proceedings.

## RELIEF UNDER VAWA FOR PERSONS SUFFERING ABUSE FROM A U.S. CITIZEN OR PERMANENT RESIDENT PARENT OR SPOUSE

Immigrant children who have been battered or subjected to extreme cruelty by a parent or spouse who is a *U.S. citizen or lawful permanent resident* may gain lawful permanent residence under immigration provisions of VAWA.<sup>5</sup> Note that there is no requirement that the person be under juvenile court jurisdiction, but there is a requirement about the immigration status of the abuser. “Parent” includes adoptive parents, stepparents, and natural parents as long as certain conditions are met.<sup>6</sup> With some exceptions, the child must be living in the United States at the time of filing the VAWA application, have resided with the abuser (this includes visitation), and be able to prove good moral character.

A common sort of VAWA case arising from dependency proceedings takes place when a child is removed from the home due to abuse by the U.S. citizen stepfather but eventually reunifies with the immigrant mother. The child does not qualify for SIJS because she reunified with the mother. The child does qualify for VAWA, however, because a U.S. citizen parent abused her. VAWA is also available to the abused spouse of a U.S. citizen or permanent resident.

The VAWA law contains many complex and beneficial provisions. For example, if only the immigrant parent or only the immigrant child has been abused, the immigrant relative who was not abused also may be able to obtain VAWA status.



## DOMESTIC VIOLENCE CRIMINAL CONVICTIONS

The complexities of the immigration consequences of crimes are beyond the scope of this article. It is worth noting, however, that a conviction for child abuse, neglect, or abandonment or for domestic violence, or a finding of a violation of a domestic violence protective order, can cause a permanent resident to lose his or her status and be deported.<sup>7</sup>

## RESOURCES

The Immigrant Legal Resource Center (ILRC) is a nonprofit back-up center in San Francisco. To download the ILRC’s comprehensive manual on SIJS, go to [www.ilrc.org](http://www.ilrc.org) (click on “Programs” and “Children’s law project”). The ILRC provides free technical assistance on SIJS to Northern California courts and advocates; contact the ILRC “attorney of the day” at 415-255-9499, ext. 6263, or at [aod@ilrc.org](mailto:aod@ilrc.org). For information or technical assistance on VAWA relief, Central Valley and Bay Area courts and advocates may also contact the ILRC attorney of the day. Other courts and advocates throughout California may call the California Rural Legal Assistance Foundation’s toll-free hotline at 800-477-7901.

*Katherine Brady is a senior attorney at the Immigrant Legal Resource Center and the author of several manuals and articles about immigration law. She is the director of the ILRC Project on Immigrant Children.*

1. 8 U.S.C. § 1101(a)(27)(J).

2. 8 C.F.R. § 204.11(a).

3. *Id.* at (a), (b)(5).

4. See 8 U.S.C. § 1182(a) for grounds of inadmissibility and 8 U.S.C. § 1255(h) for special waivers for SIJS applicants.

5. See 8 U.S.C. §§ 1154(a)(1)(A)(iv), (a)(1)(B)(iii) (2000).

6. See, generally, 8 U.S.C. § 1101(b)(1).

7. 8 U.S.C. § 1227(a)(2)(E). See information about *California Criminal Law and Immigration*, a comprehensive guide to the immigration consequences of convictions and delinquency dispositions, under “Publications” at [www.ilrc.org](http://www.ilrc.org).

# "There's No Way I'm Paying My Attorney's Bill!" or

## THE ESSENTIALS OF THE MANDATORY FEE ARBITRATION PROGRAM

*Jill Sperber and Alan Bloom, Office of Mandatory Fee Arbitration, State Bar of California*

On occasion, clients or litigants in propria persona may seek information from family law court personnel about their rights and responsibilities regarding a fee dispute with their own family law attorney. The purpose of this article is to summarize the essentials of the Mandatory Fee Arbitration Program in California, to enable court personnel to correctly identify when a dispute is a proper subject for mandatory fee arbitration and refer parties to the appropriate bar association program.

### **What is the Mandatory Fee Arbitration Program?**

The Mandatory Fee Arbitration Program ("the program") provides an opportunity to have a volunteer arbitrator resolve attorney fee and cost disputes between clients and attorneys through an informal, low-cost alternative to the court system. The arbitrator determines whether the fees and costs charged by the attorney are reasonable for the services provided. The program is authorized by Business and Professions Code section 6200 et seq.

Fee arbitration is voluntary for the client unless the parties previously agreed to arbitrate their disputes with the program. Fee arbitration is mandatory for the attorney if the client requests it. (See Bus. & Prof. Code, § 6200(c).)

### **How does the program work?**

Most fee arbitrations are conducted through the local bar associations' State Bar-approved Mandatory Fee Arbitration Programs. Jurisdiction usually lies in the county where the legal services were provided, where the attorney maintains an office, or where the client lives; however, local bar rules should be

consulted to determine whether such jurisdiction exists. A list of all the State Bar-approved local bar arbitration programs, as well as the basic filing requirements, is available on the State Bar's Web site at [www.calbar.org/2bar/3arb/4arbmfap.htm](http://www.calbar.org/2bar/3arb/4arbmfap.htm). If no local bar association program exists, if the local program lacks jurisdiction, or if either party declares that he or she cannot obtain a fair hearing at the local level, the State Bar Office of Mandatory Fee Arbitration will assume jurisdiction over the matter.

### **Are all disputes with an attorney covered by the Mandatory Fee Arbitration Program?**

No. A dispute over a fee or cost to be paid by the client that was determined pursuant to statute or court order is not covered. (See Bus. & Prof. Code, § 6200(b)(3).) For example, court-ordered or statutorily set attorney's fees in family law, bankruptcy, and probate cases are not covered by the program. Nor are claims for affirmative relief against the attorney that are for damages or are otherwise based upon alleged malpractice or professional misconduct. (See Bus. & Prof. Code, § 6200(b)(2).) However, evidence of professional negligence or misconduct is admissible in the fee arbitration hearing. (Bus. & Prof. Code, § 6203(a).)

### **What are the client's rights before an attorney may file a lawsuit to collect unpaid attorney's fees?**

Prior to or at the time of service of summons or claim in an action against the client, or prior to commencing a proceeding as an alternative to arbitration under the Mandatory Fee Arbitration

Program, the attorney shall forward a written notice to the client of his or her right to arbitration under the program. The notice shall be the State Bar-approved *Notice of Client's Right to Arbitration*. The client's failure to request fee arbitration within 30 days of his or her receipt of the notice is deemed a waiver of the right to arbitration under the program. (See Bus. & Prof. Code, § 6201(a).)

If the attorney has already filed a lawsuit against the client for unpaid fees, the client may elect to either respond to the lawsuit or request fee arbitration. If the client files a response to the lawsuit after notice of the right to arbitration is given, his or her right to arbitrate the fee dispute is deemed waived. (See Bus. & Prof. Code, § 6201(b).) If the client requests fee arbitration, the lawsuit is automatically stayed. (Bus. & Prof. Code, § 6201(c).) To alert the court, the client should file the appropriate notice of automatic stay where the lawsuit is pending. To preserve the right to arbitrate, the client should file a request for arbitration promptly.

### **What happens once arbitration is requested?**

To request arbitration, a party submits a completed arbitration request form from the fee arbitration program and pays any required filing fee. A telephone call or letter to the program requesting arbitration does not protect the right to arbitration.

The program assigns a sole arbitrator or a panel of three arbitrators (depending on the amount in dispute) to hear the

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## Mandatory Fee Arbitration

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dispute and determine whether the attorney's fees and costs were reasonable. If the arbitrator determines that the attorney's fees were not reasonable, the client may be awarded a refund of attorney's fees or costs. Alternatively, the arbitrator may determine that no refund is owed or that the client owes fees to the attorney.

Depending on the circumstances, the arbitrator considers a number of factors in making a decision. These may include whether there was a written fee agreement, the reasonable value of the attorney's services, the amount of time the attorney spent on the case, and whether any misconduct or incompetency by the attorney affected the value of the services. The arbitrator decides the matter based only upon the evidence presented at the hearing. The arbitration award is served on the parties after the hearing is submitted for decision.

### Is an attorney necessary for a party in a fee arbitration?

Because the program is intended to be a low-cost alternative to the court system, parties do not need an attorney to represent them in a fee arbitration. Either party may choose to hire an attorney at his or her own expense, but the arbitration award cannot include the attorney's fees incurred for the preparation for or appearance at the arbitration hearing. (See Bus. & Prof. Code, § 6203(a).)

### What if the client believes that the attorney engaged in misconduct or malpractice?

The Mandatory Fee Arbitration Program cannot help recover damages or offset expenses stemming from attorney malpractice or misconduct.

If the arbitrator determines that the attorney's malpractice or professional misconduct reduced the value of the attorney's services, the arbitrator can reduce the attorney's fees accordingly. However, the arbitrator cannot offset the fee or order the attorney to pay for

any damages the attorney's conduct may have caused. (See Bus. & Prof. Code, § 6203(a).) If there are concerns about attorney malpractice, they should be discussed with an independent attorney.

In addition, a disciplinary complaint may be filed with the State Bar of California by calling the **State Bar's toll-free number, 800-843-9053**. A copy of the pamphlet "What Can I Do If I Have a Problem With My Lawyer?" is available by calling the State Bar. The pamphlet may also be obtained from the Internet at [www.calbar.org](http://www.calbar.org).

A discipline complaint and a request to arbitrate a fee dispute are separate matters. Filing a complaint may result in disciplinary action against the attorney; however, the result may or may not require the attorney to pay restitution or unearned fees to the client.

### Can the client still litigate a fee dispute in court if he or she is dissatisfied with the arbitration award?

It depends on whether the fee arbitration proceeding was binding or nonbinding. Fee arbitrations are nonbinding unless the parties agree in writing to binding arbitration after the dispute arises but prior to the hearing. If the arbitration is binding, the award is final and neither party may request a new trial in court. A binding award can be corrected or vacated only for very limited reasons, set forth in Code of Civil Procedure section 1285 et seq. The time period for filing a petition to correct or vacate the award is 100 days from the date of service of the award. (Code Civ. Proc., § 1288.2.)

If the award is nonbinding, a party has 30 days from the date of service of the award to file an action in court requesting a trial to reject the award. (Bus. & Prof. Code, § 6204(c).) If a trial is not requested by either party within 30 days, the award automatically becomes binding. In small claims court, the parties may use Judicial Council forms SC-100 and SC-101 to request a trial de novo. Form SC-101 contains useful information on this process.

## How does the client enforce an arbitration award against the attorney?

An arbitration award must become final before it is enforceable. Generally, that means that the 30-day time period to request a trial de novo or the 100-day period to petition to vacate or correct the award must pass. Either party may then ask the court to enter a judgment confirming the arbitration award. The client may then enforce the judgment against the judgment debtor. (See Code Civ. Proc., § 1287.4.)

If the arbitration award rendered is in favor of the client for a refund of attorney's fees or costs, the client may request assistance from the State Bar in enforcing the award or judgment. (See Bus. & Prof. Code, § 6203(d).) The attorney's reply may consist of a payment proposal or a claim of financial inability to pay or lack of liability. By statute, the State Bar is authorized to enforce an unpaid award by imposing administrative penalties on the attorney member. It may also seek a State Bar Court order enrolling the attorney on inactive status until the award is paid. (See *ibid.*)

For further information about the Mandatory Fee Arbitration Program, please write or call:

Mandatory Fee Arbitration Program  
State Bar of California  
180 Howard Street, 6th floor  
San Francisco, California 94105  
415-538-2020

*Jill Sperber is the director of the Office of Mandatory Fee Arbitration of the State Bar of California. The office oversees the local bar Mandatory Fee Arbitration Programs in California, conducts a fee arbitration program, handles requests from clients for enforcement of arbitration awards, and provides staff assistance to the State Bar Committee on Mandatory Fee Arbitration.*

*Alan Bloom is the senior administrative assistant responsible for processing State Bar requests to enforce arbitration awards.*

# 2001 Legislative Summary

**D**uring the first year of the 2001–2002 Legislative Session, the Legislature and Governor enacted over 100 bills that affect the courts or are of general interest to the legal community. Many of these bills relate directly to issues involving children and families. A selection of pertinent bills follows. The effective date of legislation is January 1, 2002, unless otherwise noted.

The bill descriptions are intended to serve only as a guide to identifying bills of interest; they are not a complete statement of statutory changes. Code section references are to the sections most directly affected by the bill; not all sections are cited.

Until the annual pocket parts are issued, bill texts can be examined in their chaptered form in *West's California Legislative Service* or *Deering's Legislative Service*, where they are published by chapter number. In addition, chaptered bills and legislative committee analyses can be accessed at [www.leginfo.ca.gov/bilinfo.html](http://www.leginfo.ca.gov/bilinfo.html) on the Internet. Individual chapters may be ordered directly from the Legislative Bill Room, State Capitol, Sacramento, California 95814, 916-445-2323.

Update acknowledges the Administrative Office of the Courts' (AOC) Office of Governmental Affairs, the Trial Courts' Consolidated Legislation Committee, and the AOC's Office of Communications for this summary.

## CIVIL LAW AND PROCEDURE

### GOOD FAITH REPORT OF POTENTIAL SCHOOL VIOLENCE: IMMUNITY FROM DEFAMATION LIABILITY

AB 1717 ZETTEL, CH. 570  
CIV 48.8

Provides that a communication by any person to specified school personnel regarding a threat on school grounds of violence with a firearm is subject to liability in defamation only upon a showing by clear and convincing evidence that the communication or report was made with knowledge of its falsity or with reckless disregard for the truth or falsity of the communication.

## CRIMINAL LAW AND PROCEDURE

### PLAYGROUNDS: SMOKING

AB 188, VARGAS, CH. 150  
H&S 104495

Makes it an infraction to smoke a cigarette, a cigar, or another tobacco-related product within a playground or "tot lot" sandbox area. Makes it an infraction to

dispose of any cigarette, cigarette butt, cigar butt, or other tobacco-related waste within a playground or tot lot sandbox area. Makes it an infraction to retaliate against another person who seeks to attain compliance with the provisions of this section.

### CHILD PORNOGRAPHY

AB 1012, CORBETT, CH. 559  
PEN 311.11

Makes it a felony to possess child pornography if the person has a prior conviction for any of the offenses specified, including possession of child pornography; sale, distribution, or production of matter depicting sexual conduct by a minor; and use of a minor to produce matter depicting sexual conduct by a minor.

### BATTERED WOMEN'S SYNDROME: WRIT OF HABEAS CORPUS

SB 799, KARNETTE, CH. 858  
PEN 1473.5

Allows a writ of habeas corpus to be prosecuted on the grounds that evidence relating to battered women's syndrome was not introduced at the trial, the omission affecting the outcome of the case. Adds grounds for denial of a petition.

## MENTALLY ILL OFFENDERS: CRIME REDUCTION GRANTS

SB 1059, PERATA AND ORTIZ, CH. 860  
PEN 6044

Establishes the Council on Mentally Ill Offenders, one member of which shall be a superior court judge appointed by the Chief Justice, to develop policy, procedures, and projects for the treatment of mentally ill adult and juvenile offenders. Sunsets on January 1, 2007.

## DOMESTIC VIOLENCE AND CHILD ABUSE

### CHILD ABUSE REPORTING: ENDANGERMENT OF CHILD'S EMOTIONAL WELL-BEING

AB 102, ROD PACHECO, CH. 133  
PEN 11165.5–11172

Provides that any mandated reporter who has knowledge or a reasonable suspicion that mental suffering has been inflicted upon a child or that his or her emotional well-being is endangered in any way may make a report to a child protective agency.

### DOMESTIC VIOLENCE: PROTECTIVE ORDERS

AB 160, BATES, CH. 698  
FAM 6380, 6383; PEN 136.2  
DELAYED EFFECTIVE DATE: JANUARY 1, 2003  
Clarifies that a restraining order or protective order issued against a defendant as a result of a domestic violence crime has precedence over any civil court order. Directs the Judicial Council to promulgate a protocol for adoption by local courts to provide for coordination of all orders regarding the same persons. Requires that the protocol permit family or juvenile justice court orders to coexist with criminal court orders as long as the orders are consistent and protect the safety of the parties.

### DOMESTIC VIOLENCE PREVENTION ACT: DEFINITIONS

AB 362, CORBETT, CH. 110  
FAM 6210

Defines the term "dating relationship" for the purposes of the Domestic Violence Prevention Act to mean frequent, intimate associations primarily characterized by the expectation of affection or

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## 2001 Legislative Summary

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sexual involvement independent of financial considerations.

### **DOMESTIC VIOLENCE: FIREARMS**

AB 469, COHN, CH. 483  
PEN 13730

Requires a law enforcement officer who responds at the scene of a domestic violence incident to prepare a domestic violence incident report, which includes a notation of whether he or she found it necessary to inquire of the victim, the alleged abuser, or both whether a firearm or other deadly weapon was present at the location. Requires officers to confiscate a firearm or deadly weapon discovered at the location of a domestic violence incident.

### **UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROTECTION ORDERS ACT**

AB 731, WAYNE, CH. 816  
FAM 6380, 6400 *et seq.*; PEN 273.6

Enacts the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, which authorizes the enforcement of a valid foreign protection order in a tribunal of this state under certain conditions. Prescribes the criteria for a determination of validity and specifies that registration or filing of an order in this state is not required for the enforcement of a valid order. Recasts the provisions of existing law that authorize any individual to register a foreign protection order and that require a court in this state to register the order.

### **DOMESTIC VIOLENCE: VICTIMS**

AB 1017, JACKSON, CH. 712  
GOV 13960-13965.5

Includes the grandparent or grandchild of a victim within the definition of "derivative victim" and, until January 1, 2007, includes outpatient mental health expense reimbursement under these provisions. Provides for tolling the period of time for filing on behalf of a derivative victim and extends the application of certain circumstances for extension of the filing period an additional year, to January 1, 2004. Provides

that the victim need not be an adult to qualify for relocation expenses and deletes any limit on reimbursement to make a residence or vehicle accessible or a vehicle operational for a disabled victim.

### **DOMESTIC VIOLENCE: PROTECTIVE ORDERS; RECORDS, DATABASE CHECKS**

SB 66, KUEHL, CH. 572  
FAM 6306; PEN 273.75; W&I 213.5

Requires the court, prior to the issuance or denial of a protective order, to ensure that searches of specified misdemeanor convictions, outstanding warrants, and other records and of databases are conducted to determine whether the subject of the order has any specified prior criminal convictions, is on parole or probation, or is the subject of any other protective orders. Provides that the results shall not be part of the public case file but maintained in a confidential case file and shall be considered prior to issuance of further orders. Authorizes notification by the court clerk of appropriate law enforcement agencies of the issuance of the protective order. Requires notification by the court clerk of the appropriate parole or probation officer of the contents of the protective order if the subject is currently on parole. Also requires the district attorney or city attorney to perform a thorough investigation of the defendant's history and to present this information to the court—at the defendant's first appearance when setting bond, upon consideration of any plea agreement, and when passing sentence. Makes implementation of provisions relating to courts contingent on the court's being identified by the Judicial Council as currently having resources, or upon appropriation of funding for this purpose.

## EDUCATION

### **EDUCATION OF CHILDREN**

AB 804, COMMITTEE ON EDUCATION, CH. 734  
EDUC 56029 AND 56055

Expands the listing of individuals who can make a written referral for assess-

ment to include guardians and foster parents. Adds a new article titled "Foster Parents" in the Education Code and provides that foster parents have the same rights related to their foster children's education as does a parent. Provides foster parent representation rights and responsibilities regarding the child's education during the foster parent-foster child relationship.

## FAMILY LAW

### **SOCIAL SERVICES: CHILD SUPPORT ENFORCEMENT**

AB 429, ARONER AND CHAN, CH. 111  
VARIOUS CODE SECTIONS

Omnibus social services bill to change programs administered by various social services agencies. Makes the following changes related to the Department of Child Support Services (DCSS). Clarifies the relationships between the Franchise Tax Board, DCSS, and county child support agencies. Extends for one year DCSS authority to implement a new child support collection program through all-county letters and regulations. Provides authority for DCSS to require timely remissions of child support payment collections from local child support agencies. Establishes a Child Support Recovery Fund to meet federal audit requirements. Aligns the standards for payment of performance incentives to local child support agencies with federal and state program standards and arranges for payment of those incentives based on performance in the budget year and thereafter.

### **ADOPTION**

AB 538, CARDOZA, CH. 353  
FAM 7630, 8919, 9001; W&I 16005, 16010

Requires a paternity action that is consolidated with an action to terminate the parental rights of the father in an adoption proceeding to be heard in the county in which the action to terminate parental rights is filed, unless the court finds that transferring the paternity action to that county poses a substantial hardship. Authorizes a licensed clinical social worker or licensed marriage

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## 2001 Legislative Summary

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and family therapist to engage in an investigation of and make recommendations regarding stepparent adoption. Requires that siblings be assigned to the same social worker when there is a prospective adoptive family that intends to adopt the children as a sibling group, except as specified.

### MARITAL LIABILITY:

#### SPOUSAL DEBTS

AB 539, MADDOX, CH. 702

FAM 914

Specifies that an action based upon the marital liability of a deceased spouse must be commenced within a one-year period, except as specified.

### DISSOLUTION OF MARRIAGE:

#### COMMUNITY PROPERTY

AB 583, JACKSON, CH. 703

FAM 1101, 2100, 2102, 2105, 2106, 2107, 2122

Modifies provisions in marital dissolution cases regarding each party's continuing duty to update and augment his or her disclosure by providing that each party shall do so immediately, fully, and accurately upon material change. Requires that the written disclosure be made in time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business opportunity, or income-producing opportunity that presents itself after the date of separation but that results from an investment, a business activity, or another income-producing opportunity generated before the separation. Provides that specified standards apply to all activities that affect the assets or liabilities of the other spouse and the income or expenses of that party. Requires a court to set aside a judgment upon a party's failure to comply with all disclosure requirements.

### CHILD SUPPORT: DISABLED NONCUSTODIAL PARENTS

AB 891, GOLDBERG, CH. 651

FAM 4504, 5246, 17400.5, 17500; R&T 19271

Revises provisions relating to the deductibility of certain federal payments from a noncustodial parent's gross

income to include benefits paid by the Department of Veterans Affairs. Provides that a child support delinquency may not be referred to the Franchise Tax Board—or, if already referred, must be withdrawn, rescinded, or otherwise recalled—if the obligor is receiving payments under the State Supplementary Payment Program/Supplemental Security Income Program for aged, blind, and disabled persons or, but for certain excess income, would be eligible for those payments, as specified. Prohibits an order to withhold income exceeding a specified amount issued by a local child support agency in the case of a disabled obligor, as specified.

### MARRIAGE LICENSES

AB 1323, NEGRETE MCLEOD, CH. 39

FAM 423, 506, 508 et seq.

Deletes the provision requiring the person solemnizing a confidential marriage to provide the parties who were married with a copy of the confidential marriage certificate. Requires that, upon completion of the confidential marriage certificate, the parties who were married be provided with an application to obtain a certified copy of the confidential marriage certificate from the county clerk.

### CHILD SUPPORT: EARNINGS ASSIGNMENT

AB 1426, WRIGHT, CH. 371

FAM 5241

Provides that a child support obligee or a local child support agency, upon application, may obtain an order requiring payment of support by electronic transfer from an employer's bank account where the employer has willfully failed to comply with an assignment order or has other-

wise failed to comply with an assignment order on three separate occasions within a 12-month period. Provides that the court may impose a civil penalty on the employer in the amount of 50 percent of the support amount that has not been received by the obligee, under specified circumstances. Also makes the employer liable to the obligor for any interest incurred by the obligor as a result of the employer's failure to forward the payment to the obligee.

### CHILD SUPPORT: PUBLIC ASSISTANCE DEBT LIABILITY

AB 1449, KEELEY, CH. 463

FAM 17415, 17550, 17552; W&I 903

Requires the Department of Child Support Services to establish regulations for the compromise of child support arrearages owed as reimbursement for public assistance when the child is returned to the custody of the obligor. Provides that the compromise is appropriate only where the obligor parent has an income less than 250 percent of the federal poverty level and the local child support agency (LCSA) determines, pursuant to regulations, that the compromise is necessary for the support of the child. Prior to compromising the debt, LCSA is required to consult with the county child welfare department. Requires the Department of Social Services to establish regulations by October 1, 2002, defining cases in which it would be contrary to the best interest of the child for the county welfare department to refer a case to LCSA for the establishment of a support order for the reimbursement of public assistance.

### JUDICIAL PROCEEDINGS:

#### JUVENILES; CASA PROGRAMS

AB 1697, COMMITTEE ON JUDICIARY, CH. 754

CCP 1211; FAM 750, 7895; PEN 11165.7;

W&I 358.1, 827

Authorizes a commissioner or another hearing officer assigned to a family law case with custody or visitation issues to inspect the case file. Authorizes the minor's appointed counsel, if actively participating in such a family law case, to inspect the case file. Limits the

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authority given, under existing law, for inspection by family court mediators and child custody evaluators to persons who are actively participating in such a family law case. Classifies employees or volunteers of a Court Appointed Special Advocate program as "mandated reporters" who are required to report suspected child abuse and neglect to specified departments.

### PREMARITAL AGREEMENTS

*SB 78, KUEHL, CH. 286*

*FAM 1612, 1615*

Sets forth specified findings that the court is required to make in order to find that a premarital agreement was executed voluntarily. Provides that a premarital agreement regarding spousal support is not enforceable unless the party against whom enforcement is sought was represented by independent counsel or knowingly waived representation. Specifies that a premarital waiver of spousal support may not be enforced if the court later finds it to be unconscionable.

### ADOPTION: REVOCATION OF CONSENT

*SB 104, SCOTT, CH. 688*

*FAM 8801.3, 8814.5*

In an independent adoption, provides that the birth parent or parents have a 30-day period in which to either (1) sign and deliver to the Department of Social Services or delegated county adoption agency a written, notarized statement revoking the consent and requesting that the child be returned to the birth parent or parents or (2) sign, in the presence of a representative of the department or delegated county adoption agency, the waiver of the right to revoke consent on a form prescribed by the department. After revoking consent, the birth parent or parents may reinstate the original consent by signing and delivering a written, notarized statement to the department or delegated county adoption agency, in which case the revocation of consent would be void and a new 30-day period would commence.

## CHILD SUPPORT

*SB 943, COMMITTEE ON JUDICIARY, CH. 755  
FAM 17212-17804 et seq.; CCP 706.030; W&I 10081 et seq.*

Extends by 30 days the period available to the local child support agency for providing a written response to a complaint. Requires that administrative reviews by the local child support agency regarding disputes about the amount to be withheld for arrearages, pursuant to a withholding order for support of a child or claims of mistaken identity regarding child support enforcement actions, occur within 30 days of the receipt of the request and be conducted in the same manner as provided for resolution of a child support complaint. Requires county child support agencies participating in state child support incentive programs to provide specified data to the Department of Child Support Services no later than 15 days after the end of each quarter. Requires incorporation of the annual automation cooperation agreement into a specified cooperative agreement and requires the establishment of an appeals process for counties that have had federal funds withheld pursuant to these provisions.

### CHILD CUSTODY: APPEALS OR ORDERS OR JUDGMENTS

*SB 1151, MARGETT, CH. 48*

*CCP 9177*

Excludes from automatic stay provisions judgments brought pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, the Parental Kidnapping Prevention Act of 1980, and the Hague Convention on the Civil Aspects of International Child Abduction Remedies Act.

### SPOUSAL SUPPORT: DOMESTIC VIOLENCE

*SB 1221, ROMERO, CH. 293*

*FAM 3600, 4320, 4325*

Provides that, in any proceeding for dissolution of marriage where there is a criminal conviction for an act of domestic violence perpetrated by one spouse against the other and entered by the court within five years prior to the filing of the dissolution proceeding—or at any

time thereafter—there shall be a rebuttable presumption, affecting the burden of proof, that any award to the abusive spouse of temporary or permanent spousal support otherwise awardable pursuant to the standards of the provisions governing the award of spousal support should not be made. Authorizes the court to consider the convicted spouse's history as a victim of domestic violence as a condition for rebutting this presumption.

## JUVENILE DELINQUENCY

### SCHOOL: ASSAULT AND BATTERY

*AB 653, HORTON, CH. 484*

*PEN 241.2, 243.2; W&I 729.6*

Authorizes the court, when an assault was committed by a minor on school property, to order the minor to undergo counseling.

### BOOKING AND FINGERPRINTING

*AB 701, DICKERSON, CH. 334*

*W&I 626*

Provides that if a minor is released upon written notice to appear, the notice may require the minor to be fingerprinted, photographed, or both upon appearance before the probation officer.

### CRIMINAL STATISTICS: PROPOSITION 21 RESULTS

*SB 314, ALPERT, CH. 468*

*PEN 13010.5, 13012, 13012.5*

Requires the criminal justice data collected by the Department of Justice to additionally contain statistics on the administrative actions taken by the criminal justice system regarding juveniles coming under Proposition 21.

### JUVENILE COURT JUDGES: INTRACOUNTY NOTICE; TRAFFIC INFRACTIONS: NOTICE TO APPEAR

*SB 940, COMMITTEE ON JUDICIARY, CH. 830*

*VEH 40513; W&I 202, 241.1, 257, 727.3,*

*727.32, 827.9, 828*

Allows the court to proceed in juvenile infraction cases directly on a notice to appear. Requires juvenile court judges to act in accordance with the Judicial Council standard of judicial administration regarding their leadership role in

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developing a community's prevention, intervention, and treatment services for at-risk children and families. Requires the probation department to file a petition to terminate parental rights within a specified time frame for children who are foster-care wards of the court. In Los Angeles County only, establishes uniform procedures for inspection, copying, and dissemination of juvenile case files; establishes a statutory framework for disclosure of juvenile police records.

## JUVENILE DEPENDENCY

### FOSTER CARE IMPROVEMENT AND ACCOUNTABILITY ACT OF 2001

AB 636, STEINBERG, CH. 678

W&I 10601.2

Requires the Department of Social Services to establish, by April 1, 2003, the California Child and Family Service Review System, in order to review all county child welfare systems. Requires, by October 1, 2002, the California Health and Human Services Agency to convene a working group to adopt measurable outcome standards for foster children and their families. Requires the department to assist counties in ensuring that these outcomes are achieved.

### DEPENDENT CHILDREN: SIBLINGS

AB 705, STEINBERG, CH. 747

W&I 306.5, 366.21, 366.26, 366.29, 366.3

Requires a social worker to place siblings taken into temporary custody together, whenever appropriate and practical, or to document either the steps being taken to place them together or the reasons that placing them together is inappropriate or impractical. Requires the social worker to provide the supplemental report and recommendation to the child's counsel at least 10 days before the dispositional hearing. States that substantial interference with a sibling relationship would be a compelling reason for the court to consider that termination would be detrimental to the child. Provides that, upon

adoption of a dependent child, the court's jurisdiction would terminate except for purposes of enforcing the postadoption contact agreement.

### RIGHTS OF FOSTER CHILDREN

AB 899, LIU, CH. 683

H&S 1530.91

Requires foster care facilities to make certain information regarding the rights of children in foster care available to those children. Sets forth the state's policy that children placed in foster care have certain rights, and requires social workers and facilities providing social services for children in foster care to give the children information about those rights.

### JUVENILE COURT PROCEEDINGS

AB 1129, LIU, CH. 713

W&I 213.5

Allows the juvenile court to issue ex parte civil harassment orders against any person, whether or not that person is a member of the child's household. Also allows a dependency court to issue ex parte civil harassment orders to protect the parent or guardian of a dependent child, whether or not the child resides with that parent.

### FOSTER CARE LICENSING

AB 1695, COMMITTEE ON HUMAN SERVICES, CH. 653

H&S 1505 et seq.; W&I 309 et seq.

URGENCY, EFFECTIVE: OCTOBER 10, 2001

Makes changes needed to conform California law with federal regulations concerning foster care placement licensing and certification. Provides that the standards used to evaluate and grant or deny approval of the home of a relative or the home of a nonrelative extended family member for the placement of a child shall be the same standards as set forth in specified regulations for licensing foster family homes. Also provides for conditional approval pending criminal history information and revises the safety requirements regarding placement in a relative's home in specified instances. Revises the circumstances in which reunification services need not be provided to a parent or guardian from

whose custody a child has been removed by the juvenile court.

### REMOVAL FROM HOME: MINOR

AB 1696, COMMITTEE ON HUMAN

SERVICES, CH. 831

W&I 628 et seq.

Makes changes needed to keep California in compliance with federal requirements for probation youth in foster care. Requires county probation officers to make reasonable efforts to prevent the removal of a child from her or his home. Requires the juvenile court to make specified findings regarding the provision of reasonable efforts. Clarifies various provisions regarding the case plan for a ward removed from his or her home and requires that the child's parent or parents have an opportunity to participate in the development of the case plan. Authorizes the juvenile court to forgo reunification services when specified conditions exist. Also clarifies the date of entry into foster care for a child who was a dependent of the court but for whom a petition is later filed to make the child a ward of the court.

## TRAFFIC

### UNATTENDED CHILDREN IN VEHICLES

SB 255, SPEIER, CH. 855

VEH 15600 et seq.

Makes it an infraction for the parent, the legal guardian, or any other person responsible for a child 6 years of age or younger to leave that child inside a motor vehicle without the supervision of a person who is 12 years of age or older

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and (1) where there are conditions that present a significant risk to the child's health or safety or (2) when the vehicle's engine is running or the vehicle's keys are in the ignition, or (3) both. Authorizes the court to reduce or waive the fine if the defendant is economically disadvantaged and attends a community education program.

## MISCELLANEOUS

### DOMESTIC PARTNERSHIPS: LEGAL RIGHTS

AB 25, MIGDEN, CH. 893  
VARIOUS CODE SECTIONS

Expands the class of persons who may establish and register domestic partnerships to include opposite-sex couples in which only one individual, rather than both, is over the age of 62. Also expands the legal rights and economic benefits of domestic partners in a number of areas, consistent with the rights, privileges, and standing of spouses. Among other things, provides a domestic partner with the right to adopt his or her partner's child as a stepparent, to inherit property, to file wrongful death lawsuits, and to make medical decisions for an incapacitated partner, as well as the right to take sick leave, to collect unemployment insurance benefits, to file a claim for disability benefits, and to participate fully in conservatorship proceedings.

### CREDIT CARDS: ACCEPTANCE BY COURTS

AB 145, ROBERT PACHECO, CH. 108  
GOV 6159

Authorizes credit card payments for the deposit of bail for any offense not declared to be a felony and for any court-ordered fee or fine. See Assembly Bill 1700, which also includes these provisions.

# Delinquency Case Summaries

## CASES PUBLISHED FROM JULY 6 TO NOVEMBER 5, 2001

### *In re Samuel J.* (2001) 93 Cal.App.4th 130 [112 Cal.Rptr.2d 831]. Court of Appeal, First District, Division 5.

The juvenile court revoked a child's probation and committed him to the California Youth Authority (CYA).

Over a period of six years, the child was found to have violated numerous Penal Code sections. The juvenile court committed the child to an out-of-home placement, and five weeks later the probation department filed a motion to revoke probation under Welfare and Institutions Code section 777. The court permitted a probation officer to testify (based on statements made to her by other staff members) that the child had broken a window and assaulted a staff member. This hearsay testimony constituted the prosecution's entire case. The child admitted to the alleged conduct. The juvenile court found the allegations to be true and committed him to CYA. The child appealed.

The Court of Appeal reversed the decision of the juvenile court. Proposition 21 had amended section 777(c) to lessen the burden of proof and present a more flexible hearsay standard. Section 777(c) provides that the court may admit and consider reliable hearsay evidence to the same extent that such evidence would be admissible in an adult probation revocation hearing. In this case, however, the prosecution made no showing that the witnesses to the violation were unavailable or that good cause existed for the failure to present them. Thus, the juvenile court's admission of the probation officer's testimony constituted a violation of the child's federal due process rights and of section 777(c). (See *People v. Arreola* (1994) 7 Cal.4th 1144.) The appellate court determined that the admission of

the hearsay testimony was not harmless error. The appellate court stated that all of the prosecution's evidence was inadmissible and reversed the judgment of the juvenile court.

### *In re Ryan N.* (2001) 92 Cal.App.4th 1359 [112 Cal.Rptr.2d 620]. Court of Appeal, First District, Division 3.

The juvenile court adjudged a child a ward of the court under Welfare and Institutions Code section 602, for violating Penal Code section 401 (willfully and deliberately aiding, advising, and encouraging a suicide).

The child was driving the victim's car with the victim and another friend as passengers. The victim stormed out of the car in anger and threatened to jump off a bridge. The victim went to a friend's house, and the next day she saw the child driving her car. The child stopped and let the victim in the passenger's seat. The victim was feeling depressed and suicidal. The victim and the child had a discussion about suicide, including the ingestion of sleeping pills. Both the victim and the child went to a drugstore to obtain sleeping pills for the victim, and as the child was driving, the victim began ingesting 100 sleeping pills one at a time. The victim wrote a suicide note after she had ingested the pills, noting how horrible her parents were and that she loved the child. The child then drove the victim to a mall so that she could go to the bathroom. The child waited 40 minutes outside the mall, then went in. He found the victim on the ground, surrounded by security personnel. He waited until the paramedics came to the victim's aid, then left. Finding that the child had violated Penal Code section 401, the juvenile court placed the child on probation,

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## Delinquency Case Summaries

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ordered him to attend counseling, and committed him to juvenile hall for 90 days. The child appealed the decision of the juvenile court, arguing that there was insufficient evidence to support the court's finding and that his due process right was violated by the court's limiting his cross-examination of the victim.

The Court of Appeal reversed the decision of the juvenile court because the victim's suicide attempt had failed, but held that the child did commit an *attempted* violation of section 401. The appellate court is not the trier of fact and cannot substitute its own inferences for that of the juvenile court. It applied the same standard of review as would a criminal defendant challenging the sufficiency of the evidence. Section 401 provides that "every person who deliberately aids, or advises, or encourages another to commit suicide is guilty of a felony." Section 401 requires, beyond a mere verbal solicitation, active and intentional participation in events leading to the commission of an actual, overt act of suicide. (See *In re Joseph G.* (1986) 34 Cal.3d 429.) The language of the statute is limited to situations in which the victim actually accomplishes the suicide.

Purposefully aiding or soliciting an *attempted* suicide is an independent criminal offense. An attempt to commit a crime includes a specific intent to commit the crime and a direct but ineffectual act toward its commission. There was sufficient evidence to find the child guilty of an attempt to violate section 401 through his actions deliberately aiding, advising, and encouraging another person to commit suicide. In this case, the child advised the victim to ingest 100 pills, helped her to obtain the pills and handed them to her, and encouraged her to commit suicide. The appellate court reversed the decision of the juvenile court and found that the child had attempted to violate section 401.

The appellate court rejected the child's contention, based on the juvenile court's rulings limiting his cross-examination of the victim, that his constitutional rights had been violated under the due process and confrontation clauses.

### ***In re Michele D.* (2001) 92 Cal.App.4th 600 [111 Cal.Rptr.2d 909]. Court of Appeal, Second District, Division 2.**

The juvenile court adjudged a child a ward of the court for violating Penal Code sections 207(a) (kidnapping) and 667.85 (kidnapping a child with the intent to deprive the parent of custody of the child).

One year prior to the incident, the child became friendly with the mother and father of an infant. The child was invited to stay with the parents of the infant during difficult times in her life. A few days before the incident, the child suffered a miscarriage. The infant and her mother, along with the child, went to the grocery store to shop together. The child asked the mother to wait for her and the infant as they went to get some additional items, and the mother consented. Approximately an hour later, after searching for the child and the infant, the mother found an empty stroller with the child's purse and the infant's bottle. About one and one-half miles from the grocery store, the child and infant were spotted in a closed area at a car dealership. The mother, after arriving there, identified the child and the infant. The child first stated to the police that she was babysitting, but then said that she had intentionally taken the infant with the hope of raising her herself.

The child presented expert evidence that she was depressed, had a mood disorder, and had other psychological problems caused by the recent miscarriage and by emotional instability. The expert suggested that the child's condition made it impossible for her to rationalize her actions. The child appealed the decision of the juvenile court because the prosecution had failed to prove that the infant was taken by use of force or fear.

The Court of Appeal affirmed the decision of the juvenile court. Generally, kidnapping requires proof that the perpetrator used force or fear. All versions of the kidnapping statute, which has existed for over 100 years, use the term "forcibly." The child suggested that because she had not abducted the infant by force or fear, she had committed child abduction under section 278 rather than kidnapping. The appellate court addressed the many definitions of the term "force." The Penal Code provides no consistent interpretation of the term. The child argued that the appropriate definition of the word "force" is akin to the definition of "forcibly" as "effected by force used against opposition or resistance; obtained by compulsion or violence." The appellate court rejected this interpretation of the term and found that taking a child as the infant in this case was taken is a prime example of kidnapping and within the statute's scope. The appellate court held that, to prove a section 207 violation when the victim is an infant or a child, "overcoming resistance is not required and the element of the use of force is satisfied simply by the application of sufficient physical force by the perpetrator to accomplish the unlawful act." The appellate court found that there was substantial evidence in this case that supported the juvenile court's finding that the child had violated section 207(a).

### ***In re Christopher K.* (2001) 91 Cal.App.4th 853 [110 Cal.Rptr.2d 914]. Court of Appeal, Fourth District, Division 3.**

The juvenile court adjudged a child a ward of the court for violating Penal Code sections 12101(a) (possession of a firearm) and 12090 (obliterating the identification of a firearm).

The Anaheim police searched an open motel room to investigate a report that someone had a gun. The child was found sitting on the bed of the motel room, and a gun—with the serial number

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filed off—was found in the nightstand drawer. The child admitted to placing the gun in the drawer but denied obliterating the serial number. The juvenile court found that the child had violated both Penal Code sections 12101 and 12090. The child appealed the juvenile court's finding on the count concerning section 12090, contending that the statute's presumption under section 12091 was unconstitutional.

The Court of Appeal reversed the decision of the juvenile court and determined that section 12091 is unconstitutional. Penal Code section 12090 states that any person who changes, alters, removes, or obliterates a gun's identification without permission of the Department of Justice is guilty of a felony. Section 12091 provides that possession of a pistol or revolver on which the name of the maker, the model, the manufacturer's number, or any other mark of identification has been changed, altered, removed, or obliterated must be presumptive evidence that the possessor has changed, altered, removed, or obliterated the information. The parties in this case agreed that the court's only basis for finding that the child had violated section 12090 was that presumption in section 12091.

Section 12091 is a mandatory presumption. A mandatory presumption requires the trier of fact to conclude that a presumed fact is true if it finds the underlying fact true. (See *Ulster County Court v. Allen* (1979) 442 U.S. 140.) The appellate court stated that unless the underlying fact—in this case, possession of the altered gun—alone satisfies the reasonable-doubt standard with regard to the charged offense of obliteration, the presumption is constitutionally invalid. The Second and Fifth Districts have determined that possession of an altered weapon is not sufficient to prove that the defendant obliterated the identification information on the weapon. (See *People v. Henderson* (1980) 109

Cal.App.3d 59 and *People v. Wandick* (1991) 227 Cal.App.3d 918.) The appellate court reversed the finding that the child in this case obliterated the identification of the firearm. It also urged the Legislature to repeal or amend section 12091 and urged in the interim that the trials courts disregard it.

### ***Safeco v. Robert S.* (2001) 26 Cal.4th 758 [110 Cal.Rptr.2d 844]. Supreme Court of California.**

The juvenile court adjudged a child a ward of the court and placed him on probation for violating Penal Code section 192(b) (involuntary manslaughter).

The child accidentally shot his friend to death when he pulled the trigger of a gun he had found in his mother's coat pocket. The child believed the gun was unloaded. The parents of the victim brought a wrongful death action against the child and his parents. The child and his parents tendered defense against this action to Safeco Insurance Company of America. Safeco brought an action in superior court seeking a declaration that it had no duty to defend or indemnify its insureds because the policy excluded coverage of an "illegal act." The trial court ruled that the policy's illegal-act exclusion could be reasonably interpreted as applying only to *intentional* illegal acts; therefore, the act was covered.

The Court of Appeal reversed the trial court's judgment, holding that the policy did not provide coverage for an act causing a death that resulted in an adjudication of involuntary manslaughter.

The Supreme Court of California reversed the decision of the appellate court and affirmed the trial court's ruling. The Supreme Court determined that the wrongful death action was within the liability coverage of the Safeco policy, and rejected the illegal-act exclusion in this case. Justice Baxter concurred with the finding that the policy covered the child's parents' liability but dissented from the finding that the policy covered the child.

### ***In re Randy G.* (2001) 26 Cal.4th 556 [110 Cal.Rptr.2d 516]. Supreme Court of California.**

The juvenile court declared a child a ward of the court for violating Penal Code section 626.10(a) (possessing a knife with a locking blade on school grounds).

The child was seen by a school security officer between classes in an area in which students are not permitted to congregate. The security officer observed the child fixing his pocket nervously. The security officer instructed the children to get to class and then notified her supervisor. The security officer went into the child's classroom and summoned him outside, where she questioned him. The child denied that he had anything on him and did not consent to a search of his bag. He did consent to a pat-down search, which revealed a locking blade in his pocket.

The child moved to suppress arguing, contending that the discovery during the consented search was tainted by an illegal detention in violation of the Fourth Amendment. The child argued that taking him out of class and moving him to the hallway for questioning was unreasonable because there was no reasonable suspicion that he had engaged or was engaging in the violation of a criminal statute or a school rule. The motion to suppress was denied and the child was adjudged a ward of the court. The child appealed.

The Court of Appeal held that the detention of the child was reasonable, applying the standard that the detaining officer had reasonable suspicion that the person detained had been or was engaged in criminal activity.

The child argued before the Supreme Court that there were no articulable facts to support a reasonable suspicion of misconduct. The People argued that the reasonable-suspicion standard does not apply to a detention of a student by a school official on school grounds.

The Supreme Court first addressed the issue of whether or not the child

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was detained, for purposes of Fourth Amendment analysis. It found that when a school official stops a student to ask a question, the student's liberty has not been restrained over and above the limitation students experience by attending school. The conduct of school officials to move students in the classroom, and from classroom to classroom, or take them into the hallway for questioning does not seem to qualify as a detention for Fourth Amendment purposes. "Neither this court nor the Supreme Court has deemed stopping a student on school grounds during school hours, calling a student into the corridor to discuss a school-related matter, or summoning a student to the principal's office for such purposes to be a detention within the meaning of the Fourth Amendment." Detentions of students on school grounds do not offend the Constitution as long as the school official's conduct is not arbitrary, capricious, or undertaken for the purposes of harassment. The test for reasonableness of official conduct under the Fourth Amendment requires a balance between the need for the search (or seizure) and the invasion that the search (or seizure) entails.

The Supreme Court stated that the governmental interest at stake (education) is critical and that officials must be permitted to exercise broad supervisory and disciplinary powers without worrying that every encounter with a student will be converted to an opportunity for constitutional review. On balance, the intrusion on this child was trivial since the child is required to stay on campus, attend classes, appear at assemblies, and participate in outdoor physical education classes. The liberty of the child is scarcely infringed if a school security guard leads the child into the hallway to inquire about a rule violation. The Supreme Court did not decide whether the record supported a finding of reasonable suspicion, because

it concluded that with the broad authority of school administrators over students' behavior and school safety, they have the power to stop a student to ask questions even in the absence of reasonable suspicion, so long as the action is not arbitrary, capricious, or for the purposes of harassment. The child in this case had never contended that the security officer acted in such a manner, and therefore there was no Fourth Amendment violation.

The child argued that the reasonable-suspicion standard should apply to school security guards even if it is found inapplicable to teachers and administrators. The Supreme Court declined to make this distinction because the extent of the student's rights, then, would not depend on the asserted infringement but rather on the happenstance of the status of the employee who observed the misconduct. The court also declined to determine that security officers have less authority than other officials. The Supreme Court stated that it would not interfere in the method by which local school districts monitor school safety. The Supreme Court affirmed the decision of the Court of Appeal. Justice Kathryn Mickle Werdegard concurred with the majority opinion with the understanding that it did not foreclose the possibility that a teacher or a school official may be found, in an appropriate setting, to have subjected a child to a detention.

***People v. Superior Court of Los Angeles County, Rafael Gevorgyan (real party); Karen Terteryan v. Superior Court of Los Angeles County* (2001) 91 Cal.App.4th 602 [110 Cal.Rptr.2d 668]. Court of Appeal, Second District, Division 1.**

Three children were charged under Welfare and Institutions Code sections 602(b) and 707(d) by grand jury indictment. The indictment alleged that the three defendants, over age 14, committed murder to further the activities of a street gang, committed attempted murder, and engaged in street terrorism.

Terteryan demurred the indictment, alleging that only the prosecutor, under section 602(b)(1), can allege that a child personally killed a victim. The demurrer was overruled, and Terteryan appealed. Gevorgyan and the third defendant demurred the indictment, arguing that section 707(d)(1) requires the district attorney or another prosecuting officer to file the accusatory pleading. The trial court declined to sustain the demurrer but held that, under *People v. Aguirre* (1991) 227 Cal.App.3d 373, the defendants must be afforded a postindictment preliminary hearing. The People challenged the trial court's decision and petitioned for a writ of mandate. The two petitions were considered concurrently.

The Court of Appeal ordered the trial court to vacate its prior orders. The appellate court interpreted sections 602 and 707 as amended by Proposition 21 and in light of the *Aguirre* decision. With respect to murder, the prosecutor must allege that the child personally killed the victim under special circumstances. (Welf. & Inst. Code, § 602(b)(1).) An indictment does not contain the allegations of the prosecutor but rather those of the grand jury. Therefore, grand jury indictment cannot trigger direct mandatory filing under section 602(b). Section 707(d)(1) and (2) provides that for children not charged under section 602(b), the district attorney or another appropriate prosecuting officer may file an accusatory pleading. The appellate court stated that an indictment is an accusatory pleading, but it is the foreperson of the grand jury and not the district attorney who presents it to be filed. There is no precedent for designating the foreperson of a grand jury as a "prosecuting officer." Also, under Proposition 21, section 707.1 does not include the foreperson of a grand jury. The appellate court found that under section 707(d)(4) ("when the district attorney or other prosecuting officer has filed an accusatory pleading ... in conjunction with the preliminary hearing, the magistrate must make a finding

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of reasonable cause that the child comes within the provision”), the drafters of Proposition 21 did not envision grand jury indictment to be part of the statutory scheme. The appellate court’s interpretation of sections 602 and 707 did not support grand jury indictment.

The appellate court also found that postindictment preliminary hearings have been abolished and that Proposition 21 has undercut the rationale of *Aguirre*. The statute now provides that a child cannot be prosecuted in adult court without being granted a preliminary hearing. The appellate court sustained the demurrers of the three defendants. The trial court was instructed to vacate its orders (1) overruling the demurrers of the three defendants and (2) granting preliminary hearings to Gevorgyan and the third defendant. New orders must be entered sustaining the three demurrers on the ground that instant prosecution may not proceed by grand jury indictment.

***In re Joshua M.* (2001) 91 Cal.App.4th 743 [110 Cal.Rptr.2d 662]. Court of Appeal, Fourth District, Division 2.**

The juvenile court declared a child a ward of the court for violating Penal Code section 647(i) (unlawful peeking).

The victim had just gotten dressed for school when she found a note on her porch stating that the writer knew that her window blinds were pink, where her dresser was located, and what undergarments she had worn the previous morning. The note also said that she “should watch for Peeping Tom to strike again.” The victim took the note to her school security officer, who then gave the note to the deputy sheriff. When the deputy asked the child about the note, the child admitted that he had been on the victim’s property and peeked through the blinds. The juvenile court declared the child a ward of the court. The child appealed and argued that that finding must be reversed.

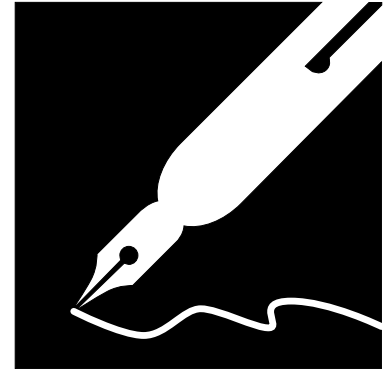
The Court of Appeal affirmed the decision of the juvenile court. The child argued that the district attorney had not proved that the child had peeked through the victim’s blinds with the intent to commit an offense if the opportunity was discovered. The elements of a section 647(i) offense are: (1) a person loitered, prowled, or wandered upon the private property of another; (2) the person did so without a lawful purpose for being on the property; and (3) the person, while doing so, peeked through the door or window of an inhabited building or structured location. The appellate court found that the People in this case were not required to prove that the child had peeked through the victim’s blinds with the intent to commit an offense if the opportunity was discovered.

The child relied on California Jury Instructions, Criminal (CALJIC) 16.447, which requires this element of section 647(i) to be proved by the district attorney. The appellate court held that this CALJIC provision erroneously instructs the trier of fact that the specific intent to commit a crime if the opportunity is discovered is an element of peeking. The appellate court also found that *In re Cregler* (1961) 56 Cal.2d 308 did not support that added element. The appellate court noted that being on the property and peeking in the window constitute a crime. The peeking itself satisfies the specific intent element. The appellate court also found that the definition of “loiter” found in section 647(h) (“to delay unlawfully on the property and for the purpose of committing a crime if the opportunity is discovered”) was limited to subdivision (h).

***In re Marcus A.* (2001) 91 Cal.App.4th 423 [109 Cal.Rptr.2d 919]. Court of Appeal, Fourth District, Division 2.**

The juvenile court committed a child to the California Youth Authority (CYA).

The child was initially detained in juvenile hall for the commission of grand theft at age 13. He was put on probation and released to the custody of his aunt. After he allegedly violated his



probation by removing the electronic monitoring device, running away from home, and testing positive for marijuana, the probation department sought to have him placed in a more restrictive setting. Another wardship petition was filed, and the child admitted to violating Penal Code section 496 (receiving stolen property). Approximately a year later, the district attorney filed another petition against the child for violating section 245(a)(1) (assault by means likely to produce great bodily injury). The child admitted to the charge and was maintained in juvenile hall. The child’s probation officer filed a notice to initiate a Welfare and Institutions Code section 777 proceeding for noncompliance with probation because the child had violated the dress code of the facility and had cigarettes. The juvenile court found that the child had not violated the dress code but had been in possession of cigarettes. The child’s attorney objected to the testimony about the cigarettes and argued that it was a separate crime that could not be raised under section 777. The juvenile court admitted the testimony and committed the child to CYA for a maximum period of five years. The child appealed.

The Court of Appeal reversed the decision of the juvenile court. The child argued that the juvenile court had erred when it committed him to CYA for his violation of probation, and the People agreed. Section 777 provides for the removal of a child to a more restrictive placement. Since the passage of Propo-

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sition 21, the statute has applied only to noncriminal violations of probation. (Welf. & Inst. Code, § 777(a)(2).) The dress code violation was properly raised at the hearing, but those allegations were found untrue. The possession of cigarettes under the age of 18 is a crime under Penal Code section 308(b), and this probation violation should not have been pursued in the section 777 proceeding. The appellate court found this error to be prejudicial and reversed the decision of the juvenile court.

***In re Eduardo C.* (2001) 90 Cal.App.4th 937 [108 Cal.Rptr.2d 924]. Court of Appeal, Second District, Division 4.**

The juvenile court ordered a child to register with the local police department as a gang member pursuant to Penal Code section 186.30.

The child pled guilty to the crime of battery on a school ground. (Pen. Code, § 243.2(a).) The child's probation report listed four prior police contacts, including a section 186.22(a) offense. Under the title "Gang Activity," the box "Yes" was checked. Also, under the title "Analysis and Plan," the report indicated that the child's formal probation should stress "no further gang/victim contact." In sentencing the child, the juvenile court ordered the child to report to the local police agency to be fingerprinted and photographed. The child's attorney objected to the registration order. In its decision to sustain the registration order, the juvenile court relied on Proposition 21. The child appealed the registration order on various constitutional grounds and as applied to him.

The Court of Appeal reversed the decision of the juvenile court. The appellate court asked whether the facts in the case justified an order requiring the child to register as a gang member pursuant to section 186.30. Section 186.30, added to the Penal Code Initiative Measure, Proposition 21, provides

three conditions any one of which requires a person to register as a gang member: (1) a petition sustained for violation of section 186.22(a); (2) any crime where the enhancement specified in section 186.22(b) is found to be true; and (3) any crime that the court finds at the time of the sentencing disposition is gang related. In its decision, the appellate court relied on the child's probation report. The appellate court determined that, although the child's probation report contained substantial information justifying gang-related conditions placed on the child during the term of his pro-

bation, there was nothing in the record to satisfy any of the three conditions for imposing the reporting requirement of section 186.30. The appellate court noted that, although the child may have committed a violation of section 186.22(a), the disposition was unknown; thus, he did not qualify for treatment under section 186.22(b)(1). There was also no indication that the child ever suffered a sentence enhancement under section 186.22(b)(2). The appellate court therefore reversed the juvenile court's decision requiring the child to register as a gang member pursuant to section 186.30.

# Dependency Case Summaries

**CASES PUBLISHED FROM  
JULY 6 TO NOVEMBER 5, 2001**

***In re Janet T.* (2001) Cal.App.4th [113 Cal.Rptr.2d 163]. Court of Appeal, Second District, Division 7.**

The juvenile court declared four children dependents at their dispositional hearing and continued the matter for a six-month review hearing.

The mother has six children: two adult children, who live independently from her, and four minor children. Between March and May 2000, there were six referrals to San Diego Children's Services regarding the mother's care for her children (including allegations of molestation, fracturing a child's skull, and holding her children by their hair). Upon the mother's move to a shelter in June 2000, the shelter made a referral to the Department of Children and Family Services (DCFS) alleging that she had neglected her children, failed to meet their medical needs (for instance, they had head lice and needed dental care), and failed to enroll the two older of the four children in school.

In July 2000 the juvenile court found a prima facie case for detaining the children. At the jurisdictional hearing, the

juvenile court sustained an amended petition in which the counts included the mother's failure to ensure her children's attendance at school, her subjecting her children to the risk of serious physical and emotional harm, and her mental and emotional problems. At the dispositional hearing, the court determined by clear and convincing evidence that there was no reasonable means of protecting the children without removing them from their mother's custody. The children were placed under the supervision of DCFS. The mother appealed.

The Court of Appeal reversed the decision of the juvenile court and determined that there was insufficient evidence to establish juvenile court jurisdiction over the children. Welfare and Institutions Code section 300(b) provides in pertinent part that a child is subject to juvenile court jurisdiction if the child "has suffered, or there is substantial risk that the child will suffer, serious physical harm or illness as a result of the failure or inability of his or

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her parent or guardian to adequately supervise or protect the child ....” The circumstances yielding juvenile court jurisdiction must exist at the time of the hearing, making it likely that the children will suffer harm in the future. The appellate court noted that past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk. In this case, there was no evidence that the children’s lack of attendance at school had subjected them to physical injury or illness. Also, the petition failed to allege facts suggesting that the mother’s mental health problems created a substantial risk of serious physical injury or illness for her children.

The appellate court noted that the six referrals to San Diego Children’s Services were closed as unsubstantiated. The evidence supporting the petition contained conditions that did not exist at the time of the hearing. Neither the petition nor the reports alleged the facts necessary to support the conclusion that the children were at risk of serious physical injury or illness because of the mother’s mental problems. The appellate court also found that although section 300(g) was factually supported, this single allegation was insufficient to support the petition against the mother. Although the appellate court reversed the decision of the juvenile court, it stated that DCFS could attempt to file another petition on valid grounds.

***In re Jesse W.* (2001) Cal.App.4th [113 Cal.Rptr.2d 184]. Court of Appeal, First District, Division 2.**

The juvenile court denied a father’s modification petition and terminated his parental rights.

The father’s three children were declared dependents of the juvenile court. The juvenile court referee sustained the supplemental petition. At the dispositional hearing, the referee continued the dependencies and made

removal findings under Welfare and Institutions Code section 361(c)(1). The dispositional order was signed by the referee but not countersigned by the juvenile court judge. The 6-month and 12-month review hearings were heard by the juvenile court judge, who denied the father’s section 388 petition seeking further services. The father favored long-term foster care for the children. The juvenile court, agreeing with the Department of Social Services, determined that the paternal grandparents should be appointed legal guardians. The father did not appeal this order but did appeal the referee’s dispositional order made 18 months earlier on the ground that it was not countersigned by a juvenile court judge under Welfare and Institutions Code section 249.

The Court of Appeal dismissed the father’s appeal. Because section 249 provides, “No order of a referee removing a minor from his home shall become effective until expressly approved by a judge of the juvenile court,” the father had argued that the dispositional order was void and that all subsequent orders would therefore also be void. The appellate court determined that the father had waived any right to appeal, however, because he had failed to appeal the dispositional order at the time it was made. The appellate court noted that a challenge to the most recent order entered in a dependency matter may not apply to prior orders when the statutory filing time for an appeal has passed. (See *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798.) The father could have appealed the dispositional order and the 6-month review order. Although he did seek writ review of the 12-month order, that petition did not raise the countersigning issue. The father’s challenge of the lack of countersigning of the dispositional order was barred by the waiver rule.

The father argued that the order was “void” and therefore subject to attack at any time. The appellate court noted that the statute provides that the orders are

not effective until approved by a judge, and it does not use the term “void” or “invalid.” The father also argued that because the order was void, it was never appealable. The appellate court rejected this argument, stating that invalidity does not affect the order’s appealability. The appellate court also stated that the judge’s signature does not necessarily reflect the judge’s approval of the merits of the referee’s order but serves to attest to the order’s authenticity. The appellate court determined that noncompliance with section 249 does not deprive the referee of fundamental jurisdiction. The appellate court dismissed the father’s appeal and denied the father’s request to treat the briefing as a petition for habeas corpus.

***In re Santos Y.* (2001) 92 Cal.App.4th 1274 [112 Cal.Rptr.2d 692]. Court of Appeal, Second District, Division 2.**

The juvenile court, dependant on the Indian Child Welfare Act (ICWA), ordered a child removed from his foster parents’ home and transferred to a home on the Chippewa Indian Reservation.

The child, a 2½-year-old multiethnic boy, was placed with his foster parents when he was 3 months old. The permanent plan for the child was that his foster parents should adopt him if his parents failed to reunify. The juvenile court determined that ICWA applied to the child because his mother was one-half Chippewa and the tribe had indicated that he was eligible for membership. The Department of Children and Family Services (“the department”) served, by certified mail, a *Notice of Involuntary Child Custody Proceedings Involving Indian Child* to the Minnesota Chippewa Tribe (“the tribe”). The tribe did not attend the dependency hearings for the child and stated that it would not intervene in the dependency process. After 15 months and numerous continuations of the dependency process, the Grand Portage Band of Chippewa (“the band”) filed a petition to intervene and a motion to continue the Welfare and Institutions

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Code section 366.26 permanent plan hearings for 60 days to allow counsel to review and investigate the case. The band contended that service on the tribe as a whole had delayed its notice because the tribe had to determine which of its bands was associated with the mother's relatives. The band notified the juvenile court that it supported reunification with the mother, but if reunification failed, the band had located a band member interested in adopting the child. The band believed that adoption by the band member instead of the foster parents was in the child's best interest.

The juvenile court granted the band's motion to intervene. Based on a finding that the child did not possess extraordinary physical or emotional needs, the juvenile court declined to depart from ICWA placement preferences and ordered the child removed from the foster parents' home to the home of an adoptive parent on the Chippewa reservation. The foster parents appealed the order on four grounds: (1) ICWA is unconstitutional; (2) ICWA may not be applied constitutionally to this case because the child was not part of an existing Indian family, and neither he nor his mother participated in Indian tribal life; (3) the tribe waived its right to assert the application of ICWA; and (4) the court applied an incorrect standard and abused its discretion in its determination that good cause did not exist to depart from ICWA placement preferences. The Court of Appeal issued and dissolved a stay, granted a petition for supersedeas, and appointed counsel for the child. Counsel for the child filed a respondent's brief in favor of reversing the order of the juvenile court.

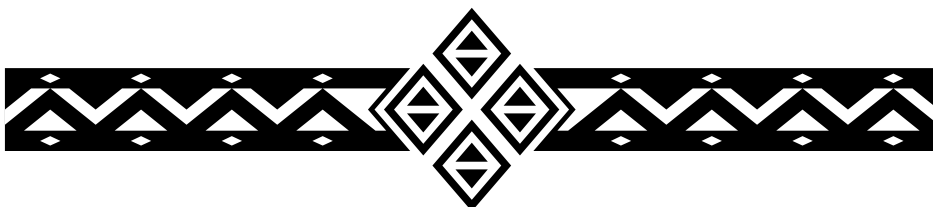
The Court of Appeal reversed the order of the juvenile court. In its decision, the appellate court determined that ICWA, California's implementation of ICWA (Cal. Rules of Court, rule 1439(g)(5)), and the "existing Indian family doctrine" were the controlling authorities in this case. ICWA (25 U.S.C. § 1901) was enacted in 1978 to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families. Courts have applied the "existing Indian family doctrine" by declining to apply ICWA to situations in which a child is not being removed from an existing Indian family and so application of the act would be unwarranted and unconstitutional.

The appellate court asked whether ICWA was constitutional as applied to this case. In its decision, the appellate court relied on *In re Bridget R.* (1996) 41 Cal.App.4th 1483, which held that recognition of the "existing Indian family doctrine" was necessary under the facts of that case in order to preserve the constitutionality of ICWA. The *Bridget R.* court held that, absent a showing by the parents of significant social, cultural, or political ties with their Indian heritage, applying ICWA to remove a child from a home in which he has formed familial bonds would violate the child's substantive due process rights. The *Bridget R.* court also subjected ICWA to an equal protection analysis and again found ICWA unconstitutional as applied. The *Bridget R.* court determined that ICWA requires Indian children who cannot be cared for by their biological parents to be treated differently from non-Indian children who are similarly situated. An Indian child who has been placed in a (non-Indian) adoptive or potential adoptive home has a greater

chance of being removed from it and being placed with strangers than does a non-Indian child in such a home. The *Bridget R.* court found that, for a child whose parents have no significant relationship with an Indian community, ICWA deprives the child of equal protection of the laws. Last, the *Bridget R.* court found that, because no substantial nexus exists between the Indian Commerce Clause and child custody proceedings involving children whose Indian families do not maintain significant relationships with an Indian tribe, community, or culture, application of ICWA to such children would impermissibly intrude upon the power reserved to the states over family relations. Section 360.6 of the Welfare and Institutions Code was enacted as a legislative response to the holding of *In re Bridget R.* that, "under the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution, the ICWA does not and cannot apply to invalidate a voluntary termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child's biological parent or parents are not only of American Indian descent but also maintain a significant social, cultural, or political relationship with their tribe." (*Bridget R.*, *supra*, 41 Cal.App.4th at p. 1492.)

The foster parents contended that ICWA is unconstitutional on its face and unconstitutional as applied. The foster parents further argued that application of ICWA to a child who is in all respects except genetic heritage indistinguishable from other residents of the state violates the Fifth, Tenth, and Fourteenth Amendments. The Court of Appeal agreed that ICWA was unconstitutional as applied in this case. In its decision, the appellate court asked whether ICWA embodies a compelling state interest that is closely tailored to the purpose of Congress's enactment as applied to this child. The appellate court determined that, in order not to violate the child's fundamental right to a stable home, the

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application of ICWA to this child must be effective and necessary to accomplish a compelling governmental purpose. The appellate court, in applying the strict scrutiny test, assessed (1) whether the tribal interests that ICWA protects are sufficiently compelling under substantive due process standards to justify the impact of the act's placement preferences on the child's constitutionally protected familial rights in his de facto family and, if so, (2) whether the application of ICWA, under the facts of this case, is necessary to further that interest. The appellate court found that in this case there was no Indian family to preserve, because the mother and child did not have any significant ties to the tribe. The appellate court further found that "repatriation," solely because of the child's one-quarter genetic heritage, to the tribe of parents who have been assimilated into the larger culture was a constitutionally impermissible application of the statute. Moreover, the appellate court found that when a child's interest outweighs the constitutionally protected interests of a biological parent, it necessarily outweighs a tribe's interest that is solely a creature of statute. Therefore, the appellate court determined that in this case application of ICWA violated the child's substantive due process rights.

The appellate court next asked whether application of ICWA in this case deprived the child of the equal protection of the dependency statutes. The appellate court relied on the foregoing facts to reach its decision. Specifically, the appellate court concluded that because application of ICWA was based solely on the child's one-quarter Chippewa genetic heritage, strict scrutiny would be compelled. The appellate court further concluded that section 360.6 would fail the test of serving a compelling state interest, narrowly tailored to that interest. Thus, the appellate court determined that ICWA as applied was a violation of

the laws under the Fifth and Fourteenth Amendments of the U.S. Constitution.

The appellate court next asked whether ICWA as applied violated the Tenth Amendment of the U.S. Constitution. The Supreme Court has reinforced the requirement that a substantial nexus exist between Congress's exercise of an enumerated power and the activity regulated by that exercise. The appellate court determined that in this case no substantial nexus existed between the Indian Commerce Clause and ICWA. The appellate court determined that, as applied to this child, ICWA impermissibly intruded on a power reserved to the states—their care of their children. Moreover, the appellate court determined that section 360.6 does not avoid a Tenth Amendment violation. Thus, the appellate court concluded that ICWA as applied violated the Tenth Amendment of the U.S. Constitution.

***In the Matter of Vincent S. (2001) 92 Cal.App.4th 1090 [112 Cal.Rptr.2d 476]. Court of Appeal, Second District, Division 3.***

The juvenile court terminated a mother's parental rights.

The mother left her 2-month-old son in a parked car while she entered a store to "return" (for a cash refund) merchandise she had not purchased, and she was arrested. The mother had a history of drug use and had had previous contacts with law enforcement. She also had another child who was under the jurisdiction of the court. The infant's father was incarcerated. The mother had previously appealed the juvenile court's order denying reunification services and setting a Welfare and Institutions Code section 366.26 hearing. The appellate court had denied the mother's petition. Prior to the section 366.26 hearing, notice of the hearing was sent to the father's residential treatment program, but he had left that program and his whereabouts were unknown. The mother's attorney wanted a continuation of the hearing to terminate the

mother's parental rights, to ensure that the father received notice of the hearing. The juvenile court ordered the father to be renoticed and proceeded with the hearing. The juvenile court terminated the mother's parental rights and rescheduled the father's section 366.26 hearing. The father's parental rights were later terminated. The mother appealed.

The Court of Appeal affirmed the order of the juvenile court but found that it had committed a procedural error. The mother argued that the juvenile court had erred when it terminated her parental rights in a hearing separate from the father's section 366.26 hearing. Rule 1463(a) of the California Rules of Court requires termination of both parents' rights in one proceeding. Thus, the juvenile court had made a procedural error when it terminated the mother's and the father's parental rights in two separate hearings. The mother did not challenge the termination order on a substantive ground, and the father abandoned his appeal. The appellate court stated that no different result would have occurred had the juvenile court continued the mother's hearing until the father received adequate notice, and that to remand for another hearing would constitute an idle act. It therefore affirmed the juvenile court's order.

***In re Leticia S. (2001) 92 Cal.App.4th 378 [111 Cal.Rptr.2d 810]. Court of Appeal, Fourth District, Division 1.***

The juvenile court granted the father of the child's sibling de facto parent status in the child's dependency proceedings.

One year after the child was born, her mother began a relationship with another man, and the child was living with the mother and the boyfriend. Three years later, the mother and the boyfriend had a child of their own. Five years after that, the police conducted a probation search of the home and found drug paraphernalia within reach of the

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two children. The parents of the younger child had been smoking methamphetamine just before the police arrived. The children were removed from the mother's care. The juvenile court granted the dependency petition and later granted a petition for de facto parent status from the father of the younger child. The court determined that this was in the child's best interest because he had been her psychological and physical parent for eight years. The child's biological father appealed, contending that the juvenile court had abused its discretion, since the applicant's behavior was the cause of the dependency petition.

The Court of Appeal reversed the decision of the juvenile court. De facto parent status was judicially created to recognize the rights of a person who has assumed the day-to-day role of a parent, fulfilling the child's psychological and physical needs. (See *In re Kieshia E.* (1995) 6 Cal.4th 68.) In determining whether a person should be granted de facto parent status, the court must consider whether the person's behavior was the cause of the court's assuming dependency jurisdiction. Because the applicant for de facto parent status was detained for leaving drugs in the child's reach, the appellate court found that the child came under the juvenile court's jurisdiction. The applicant also used drugs while he was responsible for the child's welfare. The appellate court noted that the juvenile court must determine whether an applicant for de facto parent status committed substantial harm fundamentally at odds with his or her parental role. The applicant's conduct, in this case, was the cause of the child's being declared a dependent of the court, and therefore the application should have been denied. The juvenile court should not have reviewed the totality of the circumstances. The appellate court held that the juvenile court did in fact abuse its discretion by

granting the applicant's request for de facto parent status.

***In re Crystal J.* (2001) 92 Cal.App.4th 186 [111 Cal.Rptr.2d 646]. Court of Appeal, Fifth District.**

The juvenile court adjudged a child a dependent and placed her in foster care.

The child was initially placed with her aunt and uncle after her mother died. When she was 15 years old and had been living with her aunt and uncle for 7 years, she was removed for living in an uninhabitable home. At the jurisdictional hearing the child moved to have her aunt and uncle be declared her de facto parents, justified by the fact that she had lived with them for 7 years and they had cared for all her needs. The juvenile court denied the motion because the child had been declared a dependent of the court while in their care. At the dispositional hearing, the child argued that she should be placed with her aunt and uncle. The juvenile court found this placement inappropriate and ordered the child placed in foster care. The child appealed.

The Court of Appeal decided, in this partially published opinion, that the child did not have standing to challenge the denial of her de facto parent motion. The child relied on Welfare and Institutions Code section 395 (relating to appeals) and rule 1435(b) of the California Rules of Court (stating that under section 300 a child has the right to appeal from any judgment, order, or decree specified in section 395). The appellate court noted that case law established that the appellant must demonstrate error affecting his or her own interests in order to have standing. The appellate court stated that it is clear that an individual seeking de facto parent status for him- or herself has standing to appeal his or her motion. De facto parent status provides the de facto parent with the right to be present, to be represented, and to present evidence in a dependency proceeding. The child, however, is already afforded such rights. The denial of the de facto parent

status motion did not affect the child's rights, and therefore she lacked standing on appeal. (The child did, in fact, present evidence about her relationship to her aunt and uncle, called them as witnesses, and urged that she be placed with them.) The appellate court also rejected the child's argument that she had standing because the motion was brought on her behalf. Because the child was not aggrieved by the juvenile court's denial of the motion, she lacked standing.

***Linda B. v. Superior Court of Los Angeles County* (2001) 92 Cal.App.4th 150 [111 Cal.Rptr.2d 559]. Court of Appeal, Second District, Division 4.**

The juvenile court denied a mother reunification services and set a Welfare and Institutions Code section 366.26 hearing.

The mother has a long history of drug abuse and is a schizophrenic. The child's two older siblings are also dependents of the court, and the reunification services offered to the mother for them were later denied because of her failure to comply with the case plan. The juvenile court denied reunification services for the child in this case under section 361.5(b)(2) and (b)(10). The mother contended that there was no substantial evidence to support the section 361.5(b)(2) finding (that a parent is suffering from a mental disability) because no expert evidence had been submitted. Although the county conceded this argument, it contended that the juvenile court properly denied reunification services under section 361.5(b)(10) (reunification services were terminated for any siblings or half-siblings because of the parent's failure to reunify). The mother appealed.

The Court of Appeal affirmed the decision of the juvenile court. The mother, relying on *Shawn S. v. Superior Court* (1998) 67 Cal.App.4th 1424, argued that an additional finding (other than the failure to reunify) was required—that is, that the parent “had not subse-

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quently made a reasonable effort to treat the problems that led to the removal of the sibling or half-sibling ....” (Welf.& Inst. Code, § 361.5(b)(10)(B).) However, agreeing with the decision of the Fifth District of the Court of Appeal in *Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48, the appellate court held that the reasonable-efforts provision applied solely to section 361.5(b)(10)(B). The juvenile court was not required to determine whether the mother’s subsequent efforts were reasonable when reunification services had been denied under section 361.5(b)(10)(A) (where a sibling is in a permanent plan due to the parent’s failure to reunify). The appellate court noted that, once a parent had failed to avail himself or herself of the opportunity to reunify, the general principle favoring reunification is supplanted by a legislative assumption that offering services would be an unwise use of governmental resources. The mother’s petition for mandate was denied, and the appellate court affirmed the decision of the juvenile court.

### ***In re Jonathan D.* (2001) 92 Cal.App.4th 105 [111 Cal.Rptr.2d 628]. Court of Appeal, Third District.**

The juvenile court terminated a mother’s parental rights.

A dependency petition for a 16-month-old child was filed when his mother was arrested for substance abuse. The juvenile court sustained the petition and ordered that reunification services be provided to the mother. Reunification services were terminated, and the juvenile court set a Welfare and Institutions Code section 366.26 hearing. Although the social worker’s report prior to the hearing indicated that the Indian Child Welfare Act (ICWA) did not apply in this case, notification of the hearing was sent to three Cherokee tribes. At the hearing, the social worker reported that none of these tribes had

indicated that it intended to intervene in the proceeding. Although the child’s maternal grandmother was present to provide information about the child’s Indian heritage, the juvenile court determined that the ICWA matter would not be heard at the trial and that the social service agency had complied with both federal and state law. The juvenile court denied to continue the case for the purpose of further contact with the absent Indian tribes. The juvenile court then terminated parental rights and ordered a permanent adoption plan. The day after the hearing, the social service agency filed return receipts to the court indicating that two of the tribes had not received notice at least 10 days prior to the hearing. The mother appealed.

The Court of Appeal ordered the juvenile court to comply with the notice provision of ICWA, and if there was no response from the Indian tribes, the orders must be reinstated. If, after proper notification, the Indian tribes did in fact respond that the child was of Indian heritage, then the juvenile court must conduct a new hearing in compliance with ICWA. ICWA provides that no foster care placement or termination of parental rights shall occur until at least 10 days after the receipt of notice by the parent or Indian custodian and tribe (25 U.S.C. § 1912(a)), and failure to comply with the notice provisions of ICWA is a ground for petitioning to invalidate the termination of a parental rights proceeding (25 U.S.C. § 1914). The social service agency argued that the notice requirements were not triggered because the child was not an Indian child, and that there was substantial compliance with ICWA. The appellate court rejected those arguments. The appellate court stated that notice short of 10 days prior to the hearing does not comply with ICWA technically or substantially. The notice provided to the tribe was untimely, and the juvenile court’s failure to comply with ICWA was prejudicial error.

### ***County of Los Angeles v. Superior Court of Los Angeles County* (Crystal B., real party at interest) (2001) 91 Cal.App.4th 1303 [111 Cal.Rptr.2d 471]. Court of Appeal, Second District, Division 3.**

The trial court granted relief from the claim-filing requirement for three children who had filed personal injury claims against the county for abuse they endured while dependents in the foster care system.

The children, who at the time were living with their parents but still under the jurisdiction of the court, reported to a therapist that they had been victims of serious abuse for five years while in a licensed foster home. The juvenile court appointed independent counsel for the dependent children on January 7, 1998; the appointment order stated expressly that the independent counsel were appointed to represent the children in all third-party personal injury claims and probate matters. The independent counsel never filed any claim or complaint on the children’s behalf.

Approximately one year later, on January 25, 1999, the children obtained new counsel, who filed an application with the county requesting leave to present the children’s tort claims. The application alleged that the county was liable, through the negligent supervision and monitoring of the Department of Children and Family Services, for the injuries the children incurred while in the foster home between 1991 and 1996. The county denied the application as untimely. The children petitioned the court for relief from the claim-filing requirements. The trial court granted relief, stating that the children had presented their claims within one year of accrual of their causes of action under Government Code section 911.4(b). The county filed a petition for writ of mandate to challenge the ruling, the appellate court issued an alternative writ, and the trial court vacated its ruling

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and thereby denied the petitions. The appellate court retained jurisdiction and decided the issue despite the fact that the trial court had already vacated its ruling.

The Court of Appeal held that the trial court must reinstate its order granting the children's petitions. The county argued that the trial court had erred in granting the petitions because the children had failed to present their claim within one year of the causes of action, beginning when the independent counsel were appointed. The children argued that the time to present their claim was tolled until their dependency status was terminated on January 23, 1998. They contended that, although independent counsel were appointed, the juvenile court should have also appointed a guardian ad litem. Government Code section 911.4(c) provides that, in computing the one-year period for the application to file a late claim, the time during which the person who sustained the alleged injury, damage, or loss is a minor must be counted, but the time during which the person is mentally incapacitated and does not have a guardian or conservator must not be counted. In this case, the parents had no legal custody or right to the children until the dependency case was closed.

The appellate court determined that independent counsel—like any other provider, such as a doctor or therapist—does not and cannot represent a child's interest with the same scope as either a parent or a guardian. The juvenile court should have appointed a guardian ad litem to oversee the independent counsel's work. The county argued that the independent counsel served as the equivalent of a guardian ad litem. The appellate court distinguished the responsibilities of counsel and a guardian ad litem, and agreed with the children that the independent counsel in this case were insufficient or incapable of acting on their behalf with-

out a formally appointed guardian ad litem. Because the appointment of independent counsel left the children with no parent or guardian, within the meaning of section 911.4(c), to oversee the claim and lawsuit against the county, the time allowed for the children to present their application to file a late claim did not run until the dependency case was dismissed. The appellate court also determined that the county was required to grant the children's application under section 911.6(b)(2) and that the trial court did not abuse its discretion by granting the children's petition. The appellate court discharged the alternative writ and directed the trial court to reinstate the order granting the children's petition.

Justice Patti S. Kitching dissented, finding that independent counsel were properly authorized and capable of pursuing the children's tort claims, and that the time to present these claims was not tolled beyond the date on which independent counsel were appointed. Justice Kitching argued that under Welfare and Institutions Code section 317(e) the duties of counsel are broadened to represent the child's interests, including those outside the scope of the juvenile proceeding.

***In re Christina A.* (2001) 91 Cal.App.4th 1153 [111 Cal.Rptr.2d 310]. Court of Appeal, Third District.**

The juvenile court declared a child dependent and set a six-month review hearing.

Based on allegations of abuse and neglect, the child was removed from parental custody. A detention hearing occurred 6 days later on February 28, 2000, and the child was placed in temporary foster care. The jurisdictional hearing was held on March 21, 2000, and was continued so that psychological evaluations of the mother could be obtained. The mother failed to submit to the evaluations, and the dispositional hearing was held on July 12, 2000. That hearing established that the minor was adjudged a dependent child, that it was

detrimental to the child to return her to her mother, and that reunification services would be provided to the mother. The court scheduled the six-month review hearing for January 10, 2001, under Welfare and Institutions Code section 366.21(e). The child's attorney objected, arguing that the review hearing should be set in September 2000 (six months from the jurisdictional hearing under section 361.5(a)(2)). The child appealed.

The Court of Appeal affirmed the decision of the juvenile court because the January 10 review hearing date had passed during the appeal process, but it determined that the juvenile court had erred in setting the six-month review hearing from the date of the dispositional hearing. The appellate court determined that the case was not moot even though the date of the review hearing in question had since passed, because the question was of continuing public importance and was capable of repetition. Section 366.21(e) provides that the six-month review hearing is to be held six months after the dispositional hearing. Section 361.5(a)(2) provides that for a child who is under age 3 when he or she is removed from the physical custody of his or her parent, court-ordered services should not exceed a period of six months from the date the child entered foster care (meaning the earlier date of the jurisdictional hearing or 60 days after the date on which the child was removed). The review hearing, in the context of this statute, should be held no later than the date on which services must end, to prevent needless delay between the end of services and the juvenile court's assessment of their effectiveness.

The appellate court construed the relevant dependency statutes in light of 1998 amendments in conjunction with the passage of the Adoption and Safe Families Act. The underlying purposes of those amendments were to minimize the delay in juvenile dependency pro-

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ceedings, reduce the time children stayed in temporary placement, and increase the number of adoptions. Also, section 366.21(f) provides that the timing of the permanency hearing is measured from the date the child entered foster care, and section 366(a)(1) provides that a review hearing may be scheduled less than six months after the date of the initial dispositional hearing. The appellate court stated that section 366.21(e)'s provision that the six-month review hearing is to be held six months after the initial dispositional hearing is apparently an oversight. The appellate court determined that the six-month review hearing is to be held no later than six months from the date of the jurisdictional hearing or from the date that is 60 days after the child was removed from the physical custody of his or her parents.

***Cesar V. v. Superior Court of Orange County* (2001) 91 Cal.App.4th 1023 [111 Cal.Rptr.2d 243]. Court of Appeal, Fourth District, Division 3.**

The juvenile court denied two dependent children placement with their paternal grandmother.

The children were declared dependents of the court when their mother was arrested. Cesar V. (father) was the biological and presumed father of the boy and the presumed father of the girl. Prior to the children's 12-month review hearing, the father was arrested, and he was adamant that the children should be placed with his mother. The juvenile court ordered the social services agency (SSA) to evaluate the paternal grandmother, paternal uncle, and other suitable relatives.

The social worker testified that the primary reason for not placing the children with the grandmother was her lack of relationship with the children during the dependency proceedings. The juvenile court found that SSA had acted upon its order to assess the grandmoth-

er as a placement resource and had not abused its discretion in denying placement. The father's attorney filed a Welfare and Institutions Code section 388 petition alleging that there was new evidence showing the paternal grandmother's suitability as a placement for the children. The juvenile court denied a hearing on the petition. The father and grandmother appealed, contending that SSA had never completed the relative placement evaluation it was ordered to complete, the juvenile court had used an incorrect standard in reviewing SSA's refusal to place the children with their grandmother, the juvenile court should have used independent judgment to evaluate the grandmother, and the juvenile court had erroneously denied a hearing on the section 388 petition.

The Court of Appeal reversed the juvenile court's order that had found no abuse of discretion by SSA and had denied the children's placement with their grandmother. The appellate court found that the relative placement preference under Welfare and Institutions Code section 361.3 applies when a new placement becomes necessary after reunification services are terminated but before parental rights are terminated, and adoptive placement becomes an issue. In this case, SSA's evaluation of the paternal grandmother had not been sufficient under section 361.3. A relative seeking placement must be the first prospect to be considered and investigated. The evidence showed that the social worker in this case did not make significant efforts to gather the necessary information before concluding that placement with the paternal grandmother was unsuitable. "When section 361.3 applies to a relative placement request, the juvenile court must exercise its independent judgment rather than merely reviewing SSA's placement decision for an abuse of discretion." Here, the juvenile court should have independently evaluated the paternal grandmother as a placement resource.



The appellate court also determined that the father had no standing to appeal the relative placement preference issue, but the grandmother did have such standing. The appellate court ordered the juvenile court to hold a new hearing to exercise its independent judgment about the suitability of placing the children with their paternal grandmother. Because of this order, the claim of error on the section 388 petition was deemed moot.

***In re Renee J.* (2001) 26 Cal.4th 735 [110 Cal.Rptr.2d 828]. Supreme Court of California.**

The juvenile court denied a mother reunification services with her daughter and set the matter for a permanency planning hearing.

The mother had a long history of drug use, and the juvenile court had previously terminated her parental rights regarding three other children. The mother was arrested for burglary and forgery. When she could not name any relatives to take care of her daughter, the child was detained by the social services agency (SSA). The juvenile court determined at the dispositional hearing that the mother's reunification services had been terminated in the cases of the child's two siblings and half-sibling. The court declined to order reunification services for the child in this case, pursuant to Welfare and Institutions Code sections 361.5(b)(10)(A), (B) and (b)(12). The mother appealed.

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The Court of Appeal sustained the mother's writ petition. The appellate court agreed with the mother's contention that the denial of reunification services could not be based on subdivision (b)(12) because SSA specifically waived reliance on that subdivision and the mother had had no notice that it was at issue. The appellate court also agreed with the mother that the evidence was insufficient to warrant a denial of reunification services based on subdivision (b)(10). Section 361.5(b)(10) stated that reunification services need not be provided to a parent or guardian when the court finds, by clear and convincing evidence, "that (A) the court ordered termination of reunification services for any siblings or half-siblings of the child because the parent or guardian failed to reunify with the sibling or half-sibling after the sibling or half-sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a), or (B) the parental rights of a parent or guardian over any sibling or half-sibling of the child has been permanently severed, *and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from that parent or guardian.*"

The appellate court interpreted the reasonable-efforts clause (in italics) as applicable to both subdivisions (b)(10)(A) and (B). There was no evidence that the mother was still using drugs, and ample evidence that she had abstained from use. The appellate court noted that abstinence from drug use was the ultimate goal, and SSA's argument that the mother had not completed any programs was unconvincing. The appellate court ordered the juvenile court to vacate its order denying reunification services and setting a section 366.26

hearing. The appellate court directed the juvenile court to hold a dispositional hearing and to offer reunification services. SSA petitioned the Supreme Court for an interpretation of section 361.5(b)(10) to determine whether the reasonable-efforts clause applied to both sections 361.5(b)(10)(A) and (B).

The Supreme Court reversed the decision of the Court of Appeal and rejected its interpretation of the statute. As a matter of statutory construction, there was not one clear reading that clarified whether the reasonable-efforts clause applied to both sections 361.5(b)(10)(A) and (B). In discerning the legislative intent, the Supreme Court found that reunification services should be denied for a parent who had previously failed to reunify with his or her child. The Supreme Court recognized that the enactment date of the statute was around the same time that the Legislature shortened the period for provision of reunification services from one year to six months in cases where the child was under age 3 when he or she was removed from the parent.

Section 361.5(b)(10)(A) described a situation in which a parent has failed to reunify with the child's siblings or half-siblings. The parent in this case did not make a reasonable effort to treat the problems that led to the removal of the child's siblings. Applying the reasonable-efforts clause to subdivision (A) would be redundant. Section 361.5(b)(10)(B) described a situation in which the parental rights over the child's siblings or half-siblings have been terminated, but this termination may have occurred because of something other than a parent's failure to reunify. (See *Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48 (applying the reasonable-efforts clause solely to subdivision B).) SSA noted that the legislative history indicates that the subdivisions were originally drafted as separate paragraphs. The Supreme Court rejected the mother's arguments that the reasonable-efforts clause applied to both subdivisions and

held that the clause applied only to subdivision (B).

The mother contended that interpreting the reasonable-efforts clause as applying only to section 361.5(b)(10)(B) violated both procedural and substantive due process. The Supreme Court explained that the mother had failed to establish that she possessed a constitutionally protected liberty interest in receiving reunification services from the state. Also, SSA noted that the juvenile court might still order reunification services if it was proved by clear and convincing evidence that reunification was in the best interest of the child under section 361.5(c).

Justice Joyce L. Kennard dissented in the opinion, stating that the reasonable efforts clause logically applied to both sections of the statute, based on its language and purpose. Justice Kennard would have concluded that because SSA did not challenge the appellate court's decision that the mother had made a reasonable effort to treat her problems and only contended that the reasonable-efforts clause was inapplicable, the judgment of the Court of Appeal should be affirmed.

***In re Jasmine P.* (2001) 91 Cal.App.4th 617 [110 Cal.Rptr.2d 562]. Court of Appeal, Second District, Division 3.**

The juvenile court removed a child from her mother and determined that the best permanent placement was with the child's paternal grandmother as legal guardian.

The order establishing legal guardianship made no provision for visitation between the mother and her child. The juvenile court also did not make a finding that visitation would be detrimental. The mother appealed, claiming that the juvenile court had erred by failing to make an order for continued visitation with her child.

The Court of Appeal affirmed the decision of the juvenile court. The mother had not sought a visitation order at the trial court level. The mother had

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only raised the issue on appeal, asserting that the juvenile court had a mandatory duty to make a visitation order or to determine that visitation would be detrimental to the child. Welfare and Institutions Code section 366.26(c)(4) provides, in pertinent part, that the court must order visitation with parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child. This provision, read in context, applies to children who are placed in long-term foster care with relatives or foster parents who are not willing to be legal guardians. In this case, however, the child's grandmother was ordered the legal guardian of the child, and therefore section 366.26(c)(4) did not mandate that the juvenile court arrange visitation between the child and her mother. The appellate court held that the juvenile court had not erred in failing to make a visitation order absent a request from the mother.

***Francisco G. v. Superior Court of Santa Cruz County* (2001) 91 Cal.App.4th 586 [110 Cal.Rptr.2d 679]. Court of Appeal, Sixth District.**

The juvenile court terminated a father's parental rights and ordered a bypass of reunification services.

In September 2000, the Stanislaus County Community Services Agency

filed a Welfare and Institutions Code section 300 petition when the child was born. The child and mother both tested positive for cocaine, and the agency alleged that the father and mother had traveled to Stanislaus County for the child's birth in order to avoid the child protective services in Santa Cruz County. The child's three older siblings had been subject to dependency proceedings in Santa Cruz. The father had appeared in the proceedings as the alleged father of two of the siblings and the biological father of one of the siblings. The parental rights of both parents had been terminated as to all three siblings. The social worker noted that the parents had not made any reasonable efforts to address the problems that had resulted in the removal of the child's siblings. The mother had a drug abuse problem, the father had a history of alcohol abuse, and there was a history of domestic violence.

The juvenile court in Stanislaus County found the allegations in the section 300 petition to be true and transferred the case to Santa Cruz County. At the contested dispositional hearing, the father testified that the domestic violence charges had been dropped, he had enrolled in Alcoholics Anonymous (AA), he was unaware of the mother's drug abuse, and the birth of the child in Stanislaus County had not been set up to avoid Santa Cruz County's Child Protective Services Department. However, the juvenile court declared the child a dependent of the court, ordered a bypass of reunification services for both parents, and set a section 366.26 hearing. The father appealed, contending that the juvenile court had erred in ordering a bypass of reunification services under section 361.5(b)(10)(B) because he was not the presumed father in the prior dependency proceedings, that the bypass provision also did not apply to him since he was not the custodial parent of the siblings, and that there was insufficient evidence of his failure to make reasonable efforts to

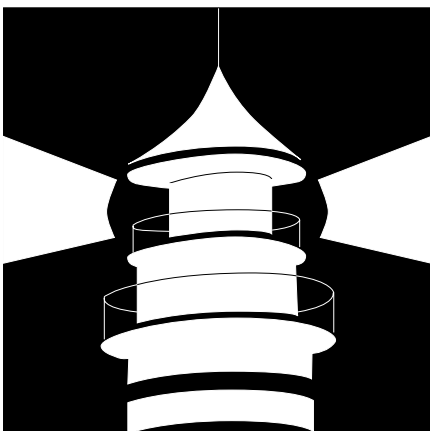
treat his problems leading to the removal of the child's siblings.

The Court of Appeal affirmed the decision of the juvenile court. The appellate court found that the bypass provision can be applied to a father whose parental rights to a sibling or half-sibling were terminated while his status in the previous dependency proceeding was that of an alleged or biological father. The appellate court determined that the term "parent" referred to the parent of the child subject to the proceedings, not the parent of that child's siblings. Section 361.5(b)(10)(B) was appropriately applied in this case. The appellate court also found that the bypass provision could be applied to a parent who was not the custodial parent of the child's siblings or half-siblings. The court may decide to order reunification services even if the parent falls within the bypass provision, if it determines that that is in the best interest of the child. Regarding the sufficiency of the evidence, the appellate court found that the juvenile court could reasonably conclude that that father had not made a reasonable effort to treat the problems that led to the removal of the child's siblings. In conjunction with the father's history of alcohol abuse and domestic violence, the father had failed to protect the children from the mother's substance abuse. The father's enrollment in AA and other programs, according to the appellate court, "simply came too late." The appellate court denied the father's extraordinary writ and affirmed the juvenile court's orders to bypass the father's reunification services and set a section 366.26 hearing.

***Karen H. v. Superior Court of Sacramento County* (2001) 91 Cal.App.4th 501 [110 Cal.Rptr.2d 665]. Court of Appeal, Third District.**

The juvenile court denied a mother reunification services and set a Welfare and Institutions Code section 366.26 hearing.

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The mother's 2-year-old and 8-year-old children were removed from her custody due to her ongoing substance abuse problems. The mother had received services from 1994 through 1998 for allegations of physical abuse, and was in a methadone maintenance program when her younger child was born. The mother had tested positive for drug use, and the Department of Health and Human Services (DHHS) had then opened a family maintenance case. There were subsequent referrals indicating that the mother had continued her drug use. DHHS continued to offer services to the mother within the family maintenance program, but the mother had two positive drug tests. The children were then removed from the mother's custody.

At the court's request, DHHS assessed the issue of denial of services under section 361.5(b)(12). The social worker concluded that the mother had resisted treatment by continuing her drug use. DHHS recommended a denial of reunification services because they were not in the children's best interest. The court found that section 361.5(b)(12) applied to the mother, and it therefore denied her reunification services and set a section 366.26 hearing. The mother contended on appeal that section 361.5(b)(12) did not apply to her and therefore the juvenile court had erred.

The Court of Appeal affirmed the decision of the juvenile court. Section 361.5(b)(12) permits the juvenile court to deny services if the parent has exhibited extensive, abusive, and chronic use of drugs and alcohol and has resisted treatment during a three-year period prior to the filing of the petition. The mother in this case had been enrolled in a voluntary treatment program. While in treatment, she repeatedly tested positive for drug use. The appellate court determined that the mother's extended pattern of drug use constituted not a relapse but resistance to treatment. The

appellate court found that the juvenile court had properly found that section 361.5(b)(12) applied to the mother because she had resisted treatment within the three-year period preceding the filing of the petitions. The appellate court noted that prior cases on this issue do not limit the facts that may be found to come within the statute, but merely exemplify some of the ways in which parental resistance to substance abuse treatment may result in the denial of services.

### ***In re Patricia T.* (2001) 91 Cal.App.4th 400 [109 Cal.Rptr.2d 904]. Court of Appeal, Second District, Division 4.**

The juvenile court denied a mother reunification services for two of her three children.

The Los Angeles County Department of Children and Family Services (DCFS) filed a dependency petition for the mother's three children. The two older children had the same natural father, and the youngest child had a different father. The petition reported that the father of the youngest child and the mother had used illegal drugs and had engaged in physical violence in front of the older children, and that the mother had failed to protect her children from excessive physical discipline. At the detention hearing, the youngest child was placed with his paternal grandmother and the older children were placed with their father. At the combined adjudication and jurisdictional hearing, the mother and father of the youngest child submitted no-contest pleas by signing waiver forms. Regarding the two older children, the juvenile court denied the mother reunification services, awarded legal and physical custody to their father, and terminated its own jurisdiction. Regarding the youngest child, the juvenile court ordered that the mother and father be provided with reunification services. The mother appealed, contending that the juvenile court had erred in taking her waiver of rights and in denying reunification services for the two older children.

The Court of Appeal affirmed the decision of the juvenile court. Rule 1449(e) of the California Rules of Court permits a parent to admit the allegations of the petition, plead no contest, or submit to the jurisdictional determinations. Upon such a plea, the juvenile court must advise the parent of the following rights: (1) the right to a hearing on the issues raised in the petition, (2) the right to assert the privilege against self-incrimination, (3) the right to confront and cross-examine all opposing witnesses, and (4) the right to compel the attendance of witnesses. (Cal. Rules of Court, rule 1449(b).) Also, the juvenile court must find and state on the record that it is satisfied that the parent understands the nature of the alleged conduct and the possible consequences of a no-contest plea. (Cal. Rules of Court, rule 1449(c).)

The mother contended that the advisements she had received had been inadequate.

The appellate court determined that the appropriate standard of review governing the admonitions would be that a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. (See *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122.) In this case, the mother submitted a form waiving her rights enumerated in rule 1449(e) and signed the bottom of the form, indicating that she had read and understood the provisions of the waiver. Also, the mother's attorney signed a declaration that she had explained and discussed with her client the rights and consequences involved.

The juvenile court found that the mother had knowingly and intelligently waived her rights and understood the consequences. Neither the mother nor her attorney had objected to or had questions about the no-contest plea.

The juvenile court properly denied reunification services under Welfare and Institutions Code section 361.2(b).

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The mother contended that (1) because DCFS recommended that she receive services, she did not understand that a consequence of the plea would be to allow those services to be denied; (2) the juvenile court did not advise her that it was contemplating termination of jurisdiction; and (3) the written waiver did not specify that a consequence of the no-contest plea might be a section 361.2(b) order. The waiver form in this case did expressly inform the mother that it was possible that no reunification services would be offered or provided. The appellate court determined that the advisement requirements of rule 1449 were met. The mother also contended that the juvenile court had improperly denied reunification services under section 361.5(b). However, because the juvenile court was apparently acting under section 361.2(b), not 361.5(b), the mother waived such a contention on appeal. The appellate court affirmed the decision of the juvenile court and discerned that it had committed no error in taking the mother's no-contest plea.

***In re Lance V.* (2001) 90 Cal.App.4th 668 [108 Cal.Rptr.2d 847]. Court of Appeal, Fifth District.**

The juvenile court altered a mother's visitation rights without a petition for modification. (Welf. & Inst. Code, § 388.)

After a child's dependency case was dismissed and the father was awarded sole physical custody, the child's mother filed an ex parte application for mediation regarding visitation. The mediation was unsuccessful. A court-ordered hearing was held regarding visitation. The mother asked the court to talk with the child because the mother and the child's attorney disagreed about the child's desire to visit with his mother. The court interceded and ordered that visitation rights be altered from 6–8 hours per week to 1 hour per week. When the mother sought to question the court regarding its order, the judge abruptly

halted the hearing, stating, "I have made my decision. That's it."

The mother appealed the order and claimed that when the court proceeded to change her visitation rights without the filing of a section 388 petition, she was deprived of her right to have a proper hearing, and that the Department of Children and Family Services (DCFS) had been allowed to alter visitation without demonstrating a change of circumstances or new evidence. DCFS argued that the mother's antecedent request for mediation had been a request to modify the existing visitation orders.

The Court of Appeal reversed the decision of the juvenile court and ordered that the visitation orders be stricken from the record. In reaching its decision, the appellate court asked whether a request for mediation authorizes a juvenile court to change its orders following an unsuccessful mediation. Mediation is a tool to aid the parties in amicably solving difficult family issues. There is nothing in the legislative history that authorizes a juvenile court to change its orders following an unsuccessful mediation. Welfare and Institutions Code section 350(a)(2) governs mediation in dependency proceedings. When a change of orders is being sought and the pertinent statutes do not otherwise provide a method for change, the proper method is a motion pursuant to section 388. The appellate court concluded that a request for mediation does not authorize a juvenile court to alter its antecedent orders.

The appellate court further asked whether the mother's due process rights to notice and an opportunity to be heard had been violated when the court modified the existing order without holding a proper hearing. Section 388(a) requires that a petition for modification set forth any change of circumstance or new evidence that is alleged to require the change of orders. Moreover, section 388(c) requires that the court order a hearing and that the court give prior notice to the persons affected by a peti-

tion for modification. Those procedural safeguards are designed to protect the due process rights of those whose interests will likely be affected by the decision. In juvenile dependency litigation, due process focuses on the right to notice and the right to be heard. A meaningful hearing requires an opportunity to examine evidence and cross-examine witnesses.

The appellate court determined that the mother had not been given notice that a change in visitation might occur, she did not have ample opportunity to refute the assertions made by others at the hearing, and she was not afforded a full opportunity to present conflicting evidence. The appellate court found that the mother had clearly sought to present evidence and to voice her disagreement with the court's modifications but was rejected on both counts. The appellate court concluded that the mother's due process rights to notice and an opportunity to be heard were compromised when the court modified the existing order without holding a proper noticed hearing on the merits. The appellate court therefore reversed the decision of the juvenile court and ordered the change in visitation order stricken.

***In re Manolito L.* (2001) 90 Cal.App.4th 753 [109 Cal.Rptr.2d 282]. Court of Appeal, Third District.**

The juvenile court denied a mother visitation rights (Welf. & Inst. Code, §§ 388 and 395), finding by a preponderance of the evidence that visits would be detrimental to the children.

The two children were declared dependents at 3 years old and 9 months old. The bases for the dependency of the children were the mother's use of methamphetamine, a lack of adequate food for the children, and the 9-month-old girl's need for medical treatment for pneumonia and a fungal infection. This case has been on appeal once before. The first time, the appellate court remanded the matter of termination on

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the basis of a possible violation of the Indian Child Welfare Act. The mother filed on this second appeal from the order terminating her visitation rights, arguing that the court had applied an erroneous standard of proof. The mother argued that the court had to find detriment to the children by clear and convincing evidence, not just a preponderance of the evidence.

The Court of Appeal, in this partially published opinion, held that the juvenile court had not erred in finding detriment to the children by a preponderance of the evidence. In reaching its decision, the appellate court asked whether the juvenile court was required to find detriment to the children in order to terminate visitation. In a status review hearing or a permanency review hearing, Welfare and Institutions Code sections 366.21(h) and 366.22(a) require that the juvenile court find that continued visitation would be detrimental to the children before terminating visitation. This case involved a section 388 hearing. Continued visitation must be permitted absent a finding of detrimental visitation. Therefore, the juvenile court was correct in requiring a finding that visitation would be detrimental to the children before terminating visitation.

The appellate court also asked what standard of proof for the adjudication of the question of detriment the Legislature had intended by various statutes. The Supreme Court has held that, where a change in a minor's placement is sought pursuant to section 388, the

correct standard of proof is a preponderance of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The appellate court did not believe that the Legislature had intended that a different standard of proof apply to the adjudication of a section 388 petition for change of visitation. Moreover, because neither section 366.21(h) nor section 366.22(a) specifies a standard of proof for the determination of detriment, the appellate court found that Evidence Code section 115 dictates that the standard of proof be a preponderance of the evidence. Therefore, the preponderance-of-evidence standard is the appropriate standard of proof for the adjudication of the question of detriment.

The mother contended that the Legislature has specified that clear and convincing evidence is the standard of proof to be applied in most juvenile court proceedings for dependant children. However, "[i]t is a settled rule of statutory construction that where a statute, with reference to one subject[,] contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." The mother recognized that the Legislature has repeatedly specified the clear-and-convincing-evidence standard of proof in the dependency scheme. The appellate court rejected the mother's contentions, finding that the inclusion of the clear-and-convincing standard of proof for the adjudication of detriment in some statutes and the omission of such a standard from Welfare and Institutions Code sections 366.21(h) and 366.22(a) was persuasive that the Legislature did not intend the clear-and-convincing standard of proof to apply to the finding of detriment under the latter statutes.

The mother also contended that under *Santosky v. Kramer* (1982) 455 U.S. 745 [71 L.Ed.2d 599] the constitutional requirements of due process of law include the requirement that a find-

ing of detriment to the child, necessary to terminate visitation, be made by clear and convincing evidence. The appellate court asked whether the constitutional guarantees of due process of law mandate a higher standard of proof than a preponderance of the evidence.

In reaching its conclusion, the appellate court evaluated the three interests set out by the Supreme Court in *Santosky*: (1) the private interests of the parents, the child, and the foster parents; (2) the interest in avoiding the risk of erroneous fact finding; and (3) the state's *parens patriae* interest in preserving and promoting the welfare of the child and the interest in reducing the cost and burden of such proceedings. The appellate court determined that the welfare interest of the children outweighed the private interest of the mother in this case, and thus the standard of proof should not be increased. Moreover, because most of the concerns expressed in *Santosky* to prevent erroneous fact finding were not present in this case, there was no reason for a higher standard of proof. And because the children had been in foster care for three years, the interest of the state in the welfare of the children was paramount. The appellate court concluded that under the *Santosky* factors due process did not mandate a higher standard of proof. Therefore, the appellate court determined that the juvenile court had not erred in finding detriment to the children by applying the preponderance-of-evidence standard, and affirmed its decision.

***In re Jamie R.* (2001) 90 Cal.App.4th 766 [109 Cal.Rptr.2d 123]. Court of Appeal, Second District, Division 6.**

The juvenile court terminated a mother's parental rights. (Welf. & Inst. Code, § 366.26(b)(1).)

The children's mother had a long history of drug abuse and had been arrested several times for drug offenses. Child Protective Services (CPS) repeatedly tried to work with the mother for

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over a year-and-a-half. After CPS had detained the children twice, the children were removed from the mother's custody. The trial court also terminated family reunification services. The children were then placed in a foster/adoptive home. The mother filed a section 388 petition for modification, requesting that the children be returned to her custody. CPS recommended that the children not be removed from the foster/adoptive home. At the outset of the section 388 hearing for modification, the mother's counsel told the trial court that there was a stipulation and that the trial court could interview the children outside the presence of counsel. The trial court spoke with the children. Based on their testimony, it denied the mother's section 388 petition and terminated her parental rights. The mother appealed and argued that the in camera interview of her children violated her due process rights because she did not have counsel present at the interview.

The Court of Appeal affirmed the decision of the trial court. In reaching its decision, the appellate court asked whether the mother had waived her right to have counsel present at the in camera interview. (A parent may waive his or her right to counsel by acquiescence.) The mother, through her attorney, invited the trial court to interview the children alone in chambers, and the stipulation was made in open court in the mother's presence. It is presumed that counsel acted with the mother's authority. Thus, the mother waived her statutory right to have counsel attend the in camera interview. Once a waiver has occurred, it is unimportant whether the right to counsel is merely statutory (Welf. & Inst. Code, § 317) or is a right of constitutional significance. Moreover, assuming there was some error, the doctrine of invited error applies when a party for tactical reasons persuades the court to follow a particular procedure; the party is estopped from claiming that

the procedure was unlawful. Therefore, because the mother had initiated the procedure through her attorney, she was estopped from claiming that the procedure was unlawful. The appellate court stated that even if the trial court had erred in not obtaining a waiver, this error was harmless beyond a reasonable doubt because there would have been no difference in the outcome of the proceeding.

The mother further argued that the trial court had erred in finding that the children would not benefit from continuing the parent-child relationship. (Welf. & Inst. Code, § 366.26(c)(1)(A).) Where the trial court finds that the child is likely to be adopted, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the child. The trial court found that the benefits of a permanent, stable home with the prospective adoptive parents outweighed any detriment the children would suffer if the mother's parental rights were terminated. On review, the appellate court stated that it could not reweigh the evidence and substitute its judgment for that of the trial court. The appellate court determined that the mother's argument that adoption was not in the best interest of the children was without merit. The appellate court concluded that the trial court had not erred in terminating the mother's parental rights, and affirmed the trial court's decision.

***In re Marina J.* (2001) 90 Cal.App.4th 731 [109 Cal.Rptr.2d 267]. Court of Appeal, Third District.**

The juvenile court denied a mother's motion for modification and terminated parental rights. (Welf. & Inst. Code, §§ 366.26, 388, and 395.)

The child's father reported that the child was of Cherokee heritage. A social worker determined that the Indian Child Welfare Act (ICWA) did not apply to the child. The child's parents appealed the orders and claimed that the juvenile

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**Diane Nunn**  
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court had committed reversible error by failing to apply various provisions of the act.

The Court of Appeal, in this partially published opinion, reversed the order of the juvenile court. In its decision, the appellate court asked whether proper notice was given to the child's tribe in accordance with ICWA. ICWA requires the Department of Social Services (DSS) to notify the Indian child's tribe of the proceedings if "the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a).) The appellate court determined that in this case the juvenile court had reason to know that the child was of Indian heritage. There was a duty for DSS to notify the tribe of the dependency proceedings, and it did not do so. In its decision, the appellate court relied on *In re Kahlen W.* (1991) 233 Cal.App.3d 1414. The *Kahlen W.* court found that notice to a child's Indian tribe is a necessary part of ICWA to protect and preserve Indian tribes and Indian families. *Kahlen W.* emphasized that notice is mandatory and that ordinary failure in the juvenile court to secure compliance with the act's notice provisions is prejudicial error.

DSS argued that because the child's parents failed to raise the issue of the applicability of ICWA in the juvenile court, they were prevented from raising the issue on appeal. In its decision, the appellate court asked whether the waiver doctrine could be invoked to preclude consideration of the parents' claims. ICWA provides that an Indian child's tribe may petition any court to invalidate a child dependency proceeding on a showing of a violation of the notice provisions. The appellate court found that DSS had not sent notice of the proceedings either to any Cherokee tribes or to the Bureau of Indian Affairs. As a result, it was unlikely that those tribes had notice of the dependency proceedings, and thus it was almost certain

that they were unable to assert their rights under ICWA. The appellate court determined that where the notice requirements of ICWA were violated and the parents did not raise that claim in a timely manner, the waiver doctrine could not be invoked to bar consideration of the notice error on appeal. The appellate court concluded that, lacking proper notice, the proceeding in the case had not produced a valid termination of parental rights, and it reversed the termination order of the juvenile court.

### ***In re Carrie M.* (2001) 90 Cal.App.4th 530 [108 Cal.Rptr.2d 856]. Court of Appeal, Second District, Division 5.**

The juvenile court terminated a mother's parental rights at a Welfare and Institutions Code section 366.26 hearing.

The mother appealed the order and petitioned the Court of Appeal for a writ of habeas corpus on the ground of ineffective assistance of counsel at the hearing. The Department of Children and Family Services (DCFS) argued that section 366.26(i) precludes habeas corpus relief from a termination order.

The Court of Appeal, in this partially published opinion, held that the mother was entitled to seek habeas corpus relief based on ineffective assistance of counsel at the section 366.26 hearing. The right to habeas corpus relief is limited, however, by the dependency order that relates to the claimed ineffective assistance of counsel and by the timing of the petition for writ of habeas corpus. The appellate court stated that a petition for writ of habeas corpus in a dependency matter raising a claim of ineffective assistance of counsel does not lie from a final order. An order is final when the time for appeal has expired and no timely appeal has been filed or when the order has been appealed and affirmed.

The Court of Appeal acknowledged that DCFS's argument was supported by dicta in *In re Meranda P.* (1997) 56 Cal.App.4th 1143. The *Meranda P.* court

held that a habeas corpus petition filed in connection with an appeal from a termination order could not be used to collaterally attack final orders antecedent to the termination order. The Court of Appeal disagreed with the contentions of DCFS and the dicta of *Meranda P.* The court stated that it is appropriate to raise the issue of ineffective assistance of counsel by petition for writ of habeas corpus filed concurrently with an appeal from a final order. The petition must relate to the order appealed from and may not be used to challenge antecedent final orders. The appellate court also stated that the appellate jurisdiction vested in the Court of Appeal includes review by extraordinary writ as well as appeal.

The Court of Appeal noted that in this case, permitting review of a termination order by habeas corpus was consistent with the interests of finality and delay reduction in child dependency proceedings, for two reasons. First, the termination order was on appeal and therefore not yet final. Thus, the habeas corpus review would not delay the finality of the termination order. Second, the ineffective-assistance-of-counsel claim was related only to the termination order and would not require review of antecedent final orders.

In addition, the appellate court stated that a parent in a dependency case has the right to effective counsel and the right to seek review of claims of incompetence. Review by direct appeal would be inadequate if counsel were ineffective in connection with the termination order in any way not apparent in the record. The appellate court concluded that the mother was entitled to seek review of the termination order by petition for habeas corpus.

# Other Cases Involving Children

## CASES PUBLISHED FROM JULY 6 TO NOVEMBER 5, 2001

***Sharon S. v. Superior Court of San Diego County* (2001) 93 Cal.App.4th 218 [113 Cal.Rptr.2d 107]. Court of Appeal, Fourth District, Division 1.**

The juvenile court denied a mother's motion to dismiss an adoption petition filed by the mother's former partner, and ordered visitation between the child and the mother's former partner.

The mother gave birth to her first son after being artificially inseminated, and the mother's partner successfully petitioned to adopt the child as a co-parent. Years later, the mother underwent the artificial insemination procedure again. The mother and her partner signed an *Independent Adoption Placement Agreement* stating (1) that the mother could revoke consent to the adoption by the partner for only 90 days after the adoption petition was approved by the court and (2) that the mother would give up her rights to the custody of and services to the child. However, an addendum was attached to the agreement, stating that the mother intended to retain all of her parental rights to the care, custody, and control of the child.

The relationship between the mother and her partner became strained, and each woman retained new counsel. After the adoption was mediated, a temporary visitation plan was scheduled. The mother's partner filed a motion to adopt the child, contending that the mother's consent had become irrevocable. A family court services counselor recommended that the mother and her former partner share joint legal custody of the children. The juvenile court ordered visitation and appointed an attorney for the child. The mother filed

a motion to dismiss the adoption because it was unauthorized by statute, and she claimed that her former partner lacked standing to seek adoption of her child. The child's attorney also filed a motion to dismiss the adoption petition. The juvenile court denied both of these motions. The mother appealed.

The Court of Appeal reversed the decision of the juvenile court. The appellate court explained that there are three methods of adopting an unmarried child: (1) agency adoption (birth parents relinquish their rights to the child to a licensed adoption agency), (2) independent adoption (the parents of the child relinquish their rights directly to adoptive parents), and (3) stepparent adoption (the spouse of a child's birth parent petitions the court to adopt the child). The mother's partner conceded that her petition to adopt the child did not meet the criteria of any of these three adoptions. She argued that her petition sought a modified independent adoption and that the adoption statutes must not preclude a second-parent adoption that was in the best interest of the child. The social services agency, without express statutory authority, indicated that it had developed practices to facilitate second-parent adoptions (including independent adoption as in this case, in which the birth parent consents to an adoption but expresses an intent to retain her parental rights). The appellate court concluded that a second-parent adoption cannot be accomplished through an independent adoption.

The appellate court noted that the language of the statutes is clear and unambiguous and there is no authoriza-

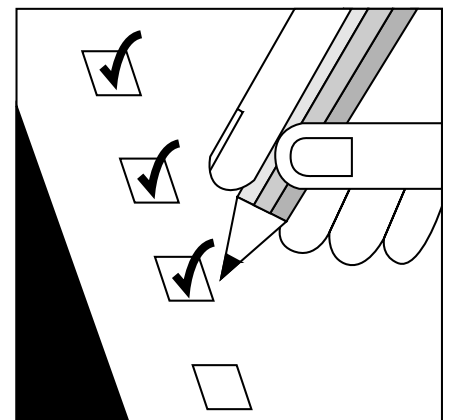
tion for such second-parent adoptions. The statutes governing independent adoptions mandate that the parental rights of the birth parent be terminated. The mother in this case did not unequivocally agree to a termination of her parental rights. The appellate court concluded that the juvenile court had erred in denying the mother's motion to dismiss the adoption petition and the visitation order between her former partner and her child. The appellate court deemed moot the mother's request for writ relief from orders compelling discovery, and concluded that the sanction orders against the mother should be vacated. Justice Daniel J. Kremer dissented in the opinion. Justice Kremer determined that *Marshall v. Marshall* (1925) 196 Cal. 761 should have been the controlling case and that California's adoption laws are to be liberally construed to protect the welfare of children. The Family Code as interpreted by Justice Kremer does not exclude second-parent adoptions, and the order denying the mother's motion to dismiss the adoption petition should have been upheld.

***Adoption of Baby Boy D.* (2001) 93 Cal.App.4th 1 [112 Cal.Rptr.2d 760]. Court of Appeal, Second District, Division 7.**

The trial court transferred custody of a child from the adopting parents to the birth mother.

In an agency adoption, the birth mother failed to initial one of the 20

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boxes on the relinquishment form. Upon receipt of the relinquishment form, the Department of Social Services (DSS) refused to acknowledge it because one of the boxes was not initialed. DSS denied acknowledgment of the form two more times despite the fact that the agency had sent affidavits. The birth mother testified that her failure to initial one of the boxes was an oversight and that she had signed the document freely and willingly. The trial court found that the relinquishment was defective because it was incomplete, and that DSS had acted within its authority in refusing to acknowledge it. The court ordered that the child be returned to the birth mother on a gradual basis. The adoptive parents appealed.

The Court of Appeal reversed the decision of the trial court. It concluded that the court should have done more than review the action of DSS and determine the completeness of the form; the trial court should have determined whether the form was valid based on the mother's waiver of parental rights. The refusal of DSS to acknowledge the form is not determinative of whether or not it was valid. The birth mother knowingly and voluntarily signed the relinquishment form with the intent to place her child up for adoption. She intended to initial box 20 of the form. The appellate court ordered that DSS receive and acknowledge the birth mother's relinquishment form. The trial court was also directed to terminate the birth mother's parental rights.

***In re Mark Anthony Jensen (on habeas corpus)* (2001) 92 Cal.App.4th 262 [111 Cal.Rptr.2d 751]. Court of Appeal, Fourth District, Division 1.**

The trial court sentenced the juvenile defendant after a jury convicted him of being in possession of a firearm under Penal Code section 12021(a) and found that he had served three prior prison



terms and suffered two prior strike convictions under Penal Code section 667.

One of the strikes was a juvenile adjudication for voluntary manslaughter. The defendant had struck a man several times in the head with a piece of driftwood after the victim had made a sexual advance toward him, and then he had covered the victim with sand. The victim was still breathing when the defendant left the scene. The defendant appealed, contending that the trial court had erroneously treated that prior juvenile adjudication as a strike.

The Court of Appeal granted a writ of habeas corpus and directed the trial court to vacate its sentence and to conduct further sentencing proceedings. Certain prior juvenile adjudications can be deemed strikes for sentencing purposes under section 667(d)(3). Section 667(d)(3) provides that a prior juvenile adjudication must constitute a prior felony conviction for the purposes of sentencing enhancements if: (A) the child was 16 or older; (B) the prior offense was listed in Welfare and Institutions Code section 707(b) or listed in Penal Code section 667(d)(1) or (2) as a felony; (C) the child was found fit to be dealt with under juvenile court law; and (D) the child was adjudged a ward under Welfare and Institutions Code section 602 because he or she committed an offense listed in section 707(b).

The People argued that the defendant's conduct constituted an assault by any means likely to cause great bodily injury under section 707(b). However, the juvenile court petition did not allege such conduct, and no section 707(b) finding was made. Because the defendant was not adjudged a ward for violating section 707(b), Penal Code section 667(d)(3)(D) was not fulfilled. A prior juvenile adjudication cannot be used as a strike unless all four conditions are met. Therefore, the defendant's prior juvenile adjudication for voluntary manslaughter did not qualify as a strike under section 667(d)(3).

***People v. Trevino* (2001) 26 Cal.App.4th 237 [109 Cal.Rptr.2d 567]. Supreme Court of California.**

The trial court sentenced the defendant to life imprisonment without the possibility of parole, finding a prior-murder special circumstance. (Pen. Code, § 190.2.)

In California, the penalty for first-degree murder is either death or life imprisonment without the possibility of parole if the prosecution proves one or more of the special circumstances specified in Penal Code section 190.2. One of these special circumstances, known as the prior-murder special circumstance, is that "[t]he defendant was convicted previously of murder in the first or second degree." (Pen. Code, § 190.2(a)(2).) The defendant in this case was 33 years old when he committed the recent murder in California, and he had been 15 when he committed a murder in Texas. At trial, the prosecution alleged that the Texas conviction was a prior-murder special circumstance. The defendant argued that the Texas murder did not qualify as a prior-murder special circumstance because at the time of the murder, 1978, the defendant could not have been tried as an adult in California. (A person younger than 16 in California could not be tried as an adult.) The trial court denied the defendant's motion to

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## Other Cases Involving Children

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strike the Texas conviction as a prior-murder special circumstance and sentenced him to life imprisonment without the possibility of parole. The defendant appealed and renewed his argument that the prior-murder special circumstance could not be based on an offense committed in another jurisdiction if, when he committed the offense, the defendant was too young to be tried as an adult in California.

The Court of Appeal reversed the decision of the trial court. The Court of Appeal set aside the prior-murder special circumstance finding, vacated the sentence, and remanded the matter to the trial court for resentencing. The Supreme Court of California granted the People's petition for review.

The Supreme Court of California reversed the decision of the Court of Appeal. The court asked whether a prior-murder special circumstance finding can be based on an offense committed in another jurisdiction if, under the law at the time of the offense, the defendant was too young to be tried as an adult in California. Penal Code section 190.2(a)(2) states: "For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree." The majority determined that the statute's focus is on the "conduct," not the age or other personal characteristics of the person engaged in the conduct. It is the offense and not necessarily the offender that must satisfy statutory requirements for punishment under California law as first- or second-degree murder. Moreover, the majority determined that the Legislature would have drafted a provision to require consideration of the defendant's age or other personal characteristics, as in Penal Code section 688, if it had intend-

ed to impose those requirements. The majority concluded that a conviction in another jurisdiction may be deemed a conviction of first- or second-degree murder for purposes of California's prior-murder special circumstances if the offense involved conduct that satisfies all the elements of the offense of murder under California law, whether or not the defendant, when he committed that offense, was old enough to be tried as an adult in California. Therefore, the court reversed the decision of the appellate court and remanded the appeal to that court with directions to affirm the trial court's judgment.

Chief Justice Ronald M. George, joined by Justice Kathryn Mickle Werdegar, dissented. The dissent disagreed with the majority's reading of section 190.2(a)(2) as not referring to the status, personal characteristics, or circumstances of the accused. The dissenters determined that the words "would be punishable as" refer not merely to the elements of the offense but to the potential punishment that could be imposed. Homicide committed by a person 15 years of age was not "punishable as" murder in California in 1978 when the defendant was convicted in Texas. The dissent noted that when a statute is ambiguous and there are differing, reasonable interpretations, any ambiguity in the statutory language should be interpreted as favorably for the defendant as its language and the circumstances of its application permit. The dissenters believed that the statute should be interpreted so that "it would not include the conviction of a minor in a foreign jurisdiction for an offense that could not have been punished as first or second degree murder had the offense been committed in California."

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## Center for Families, Children & the Courts

### Update

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